

# HARVARD LAW REVIEW

## THE REFORMATION OF AMERICAN ADMINISTRATIVE LAW

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*The traditional model of American administrative law has been centrally concerned with restricting administrative actions to those authorized by legislative directives. Professor Stewart traces the development and disintegration of the traditional model, which has proven unsuccessful in its effort to reconcile the discretionary power enjoyed by agencies with the basic premise of the liberal state that the only legitimate intrusions into private liberty and property interests are those consented to through legislative processes. He presents a critical analysis of several responses to the contemporary critique that agencies exercise their discretion in favor of organized and regulated interests, including the efforts by federal judges to transform the elements of the traditional model to ensure more adequate representation for all interests affected by agency decisions. The emerging interest representation model of administrative law, he concludes, ultimately fails as a general structure for legitimating agency action.*

There is now general agreement about the necessity for delegated legislation; the real problem is how this legislation can be reconciled with the processes of democratic consultation, scrutiny and control.

— Aneurin Bevan <sup>1</sup>

AMERICAN administrative law is undergoing a fundamental transformation that calls into question its appropriate role in our legal system. This transformation is largely the handiwork of federal judges, and it is upon their efforts, and its implications, that this Article will focus.

The traditional model of administrative law, developed out of judicial decisions and legislative enactment during the first six decades of this century,<sup>2</sup> has sought to reconcile the competing

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<sup>1</sup> A. Bevan, in *The Select Committee on Delegated Legislation*, 1953 *Minutes of Evidence* 144, quoted in C. ALLEN, *LAW AND ORDERS* 164-65 (3d ed. 1965).

<sup>2</sup> See generally K. DAVIS, *ADMINISTRATIVE LAW TREATISE* (1958 & Supp. 1970); L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* (1965); *Administrative Procedure Act*, 5 U.S.C. §§ 551, 554-559, 701-706, 1305, 3105, 3344, 5362, 7521 (1970); *id.* §§ 552-553 (Supp. III 1973).

claims of governmental authority and private autonomy by prohibiting official intrusions on private liberty or property unless authorized by legislative directives. To promote this end, the traditional model affords judicial review in order to cabin administrative discretion within statutory bounds, and requires agencies to follow decisional procedures designed to promote the accuracy, rationality, and reviewability of agency application of legislative directives.

Two fundamental criticisms have been levied against the traditional model. First, it has been asserted that the limitation of the traditional model's protections to recognized liberty and property interests is no longer appropriate in view of the seemingly inexorable expansion of governmental power over private welfare.<sup>3</sup> Second, it has been argued that agencies have failed to discharge their respective mandates to protect the interests of the public in given fields of administration, and that the traditional model has been unable to remedy such failure.<sup>4</sup>

In response to these criticisms, judges have greatly extended the machinery of the traditional model to protect new classes of interests. In the space of a few years the Supreme Court has largely eliminated the doctrine of standing as a barrier to challenging agency action in court, and judges have accorded a wide variety of affected interests the right not only to participate in, but to force the initiation of, formal proceedings before the agency. Indeed, this process has gone beyond the mere extension of participation and standing rights, working a fundamental transformation of the traditional model. Increasingly, the function of administrative law is not the protection of private autonomy but the provision of a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision. Whether this is a coherent or workable aim is an open issue. But there is no denying the importance of the transformation.

This Article's basic approach will be both descriptive and critical: an effort to portray and to lay bare the inner premises of doctrinal evolution in response to perceived social and governmental exigencies. The hazards in expounding so general a theme are all too obvious, particularly in view of the seemingly bewildering diversity of forms and functions assumed by administrative agencies.<sup>5</sup> The traditional conception of administrative law does,

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<sup>3</sup> See pp. 1681-82 *infra*.

<sup>4</sup> See pp. 1682-87 *infra*.

<sup>5</sup> The conception of administrative law as a unified body of doctrine with general applicability risks papering over significant differences in administrative functions, agency forms, and the sources and operative foci of various administrative

however, bespeak a common social value in legitimating, through controlling rules and procedures, the exercise of power over private interests by officials not otherwise formally accountable. If we take seriously the possibility of a legal system giving expression to such basic values, then an inquiry into these values and their institutional realization is justified. On the other hand, the contemporary proliferation of administrative activities pursuant to broad legislative directives challenges the continuing viability of received principles of judicial control and forces a reconsideration of the coherence of any general theory of administrative law. These concerns underlie the discussion throughout and are addressed in speculative fashion in this Article's concluding section.

## I. THE TRADITIONAL MODEL AND THE PROBLEM OF DISCRETION

An appreciation of the logic and operation of the traditional model of administrative law is essential to the understanding of its current transformation. Thus an account of the traditional model's premises and development is a necessary prelude to the principal subject of this Article.

### A. *The Traditional Model*

Our inquiry into the traditional model of American administrative law begins with the developments generated by the regulation of private business conduct which commenced on a broad scale in the latter part of the nineteenth century. The direct control by state, and then federal, administrative officials of rates, services, and other practices, first of railroads and then of a wide variety of other enterprises, grew so pervasive and intrusive that it could not be justified by reference to past executive practices. Accordingly, a body of doctrines and techniques developed to reconcile the new assertions of governmental power with a long-

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law doctrines. See Jaffe, *English Administrative Law—A Reply to Professor Davis*, 1962 PUB. LAW 407, 410-11. Beyond the potential distorting effect of any effort to discern and apply a common model of administrative law is a more devastating objection—its irrelevance. Most administrative agencies act in a highly charged field of political forces which include the legislature, other executive bodies and officials, and a variety of more or less well-organized political, social and economic groups and interests. The internal bureaucratic organization, traditions and expectations of the agency and its personnel are also major factors in its environment. The policies adopted by the agencies, the energy and effectiveness with which they are pursued, and the agency's ultimate impact on the world may all be far more a function of these factors than the formal apparatus of administrative law. See, e.g., Handler, *Controlling Official Behavior in Welfare Administration*, 54 CALIF. L. REV. 479, 479-82 (1966). See also p. 1685 *infra*.

standing solicitude for private liberties by means of controls that served both to limit and legitimate such power. During the period 1880-1960 a coherent set of principles emerged. Though not fully applicable to every exercise of administrative power, this body of doctrine has nonetheless enjoyed such widespread acceptance that it may be termed the traditional model of administrative law. Its essential elements are:

(1) *The imposition of administratively determined sanctions on private individuals must be authorized by the legislature through rules which control agency action.*—With the possible exceptions of military and foreign affairs functions and times of national emergency, the Constitution recognizes no inherent administrative powers over persons and property. Coercive controls on private conduct must be authorized by the legislature, and, under the doctrine against delegation of legislative power, the legislature must promulgate rules, standards, goals, or some “intelligible principle” to guide the exercise of administrative power.<sup>6</sup>

The doctrine against delegation appears ultimately to be bottomed on contractarian political theory running back to Hobbes and Locke, under which consent is the only legitimate basis for the exercise of the coercive power of government.<sup>7</sup> Since the process of consent is institutionalized in the legislature, that body must authorize any new official imposition of sanctions on private persons; such persons<sup>8</sup> in turn enjoy a correlative right to repel official intrusions not so authorized.<sup>9</sup> These principles would, however, be deprived of all practical significance were the legislature permitted to delegate its lawmaking power in gross.<sup>10</sup> Choices among competing social policies would be made

<sup>6</sup> *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

<sup>7</sup> Commentators have stressed the textual basis in Article I of the Constitution for the doctrine against delegation. See T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 116-17 (1868). However, once it is acknowledged that some delegations of legislative power are permissible, see, e.g., *American Trucking Ass'ns, Inc. v. United States*, 344 U.S. 298, 309-12 (1953), the textual argument is substantially less useful as a guide to decision.

<sup>8</sup> Since so much of administrative law concerns the regulation of business corporations, it was vital to the development of the traditional model that corporations be entitled to the same protections against administrative authority as natural individuals. See generally T. ARNOLD, THE FOLKLORE OF CAPITALISM 185-206 (1937).

<sup>9</sup> See G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1766-1787, at 303-04 (1969); pp. 1717, 1723-24 *infra*. See also M. WEBER, ON LAW IN ECONOMY AND SOCIETY 47-48 n.14 (M. Rheinstein ed. 1954).

<sup>10</sup> It may be argued that the legislature has agreed to accord an agency discretion, and therefore the members of society have consented to the agency's exercise of discretion. But to speak of legislative “agreement” may be misleading; broad delegation is more often a function of political standoff or legislative in-

by non-elected executive officials.<sup>11</sup> Moreover, the absence of meaningful statutory controls on agencies would deprive citizens of effective protections against the abusive exercise of administrative power; the legislature could not exercise continuous supervision of all agency actions,<sup>12</sup> and without a guiding statutory directive the courts would have no benchmark against which to measure assertions of agency power.<sup>13</sup>

The requirement that agencies conform to specific legislative directives not only legitimates administrative action by reference to higher authority, but also curbs officials' exploitation of the governmental apparatus to give vent to private prejudice or passion.<sup>14</sup> At the same time, private autonomy is secured in two ways by such a requirement. First, it promotes formal justice by ensuring that the governmental sanctions faced by an individual are rule-governed, which facilitates private avoidance of sanctions and allows interaction with the government on terms most advantageous to the individual. Second, on contractarian premises, the requirement ensures that sanctions have been validated by a governmental authority to which the individual has consented and therefore the restraints imposed by the threat of sanctions may be viewed as self-imposed.<sup>15</sup>

(2) *The decisional procedures followed by the agency must be such as will tend to ensure the agency's compliance with requirement (1).* — If agencies may exercise delegated powers only

capacity. See p. 1695 *infra*. More fundamentally, the process and results of decisionmaking may differ significantly between the agency and the legislature. Thus consent to a legislative resolution of disputed questions of social policy does not fairly imply consent to the remission of such questions to the legislature's agency. See E. FREUND, *ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY* 220-21 (1928).

<sup>11</sup> See *United States v. Robel*, 389 U.S. 258, 275-77 (1967) (Brennan, J., concurring); *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part).

<sup>12</sup> See note 128 *infra*.

<sup>13</sup> See *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part); pp. 1781-89 *infra*.

<sup>14</sup> The requirement that legislative authorization be expressed in terms of general rules, standards, or goals, see *United States v. Lovett*, 328 U.S. 303, 315 (1946), is calculated to restrain legislators in a similar fashion.

<sup>15</sup> See J. RAWLS, *A THEORY OF JUSTICE* 7-22, 118-83 (1971); J.-J. ROUSSEAU, *THE SOCIAL CONTRACT*, Book I, chs. V, VI. Private autonomy may thus be defined as individual freedom of choice constrained only by rule-governed sanctions authorized through procedures to which an individual would consent. See J. LOCKE, *THE TWO TREATISES OF GOVERNMENT*, Book II, § 22 (P. Laslett ed. 1960). See also Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973). In addition to facilitating an individual's calculated satisfaction of his various interests, freedom from constraints other than those imposed through procedures to which one would consent may be viewed as a good in itself.

in accordance with legislative directives, and if effective limitation on administrative power is not to be more theoretical than real, agency procedures must be designed to promote the accurate, impartial, and rational application of legislative directives to given cases or classes of cases. Thus where the facts that would justify governmental action are disputed and important liberty or property interests are at stake, a hearing is generally required in which the person whose interests are threatened has the opportunity to present evidence and challenge the factual and legal bases for the agency's action. Moreover, the agency must normally decide the matter on the basis of the record developed at the hearing through factfindings supported by substantial evidence and the reasoned application of legislative directives to the facts found.<sup>16</sup>

(3) *The decisional processes of the agency must facilitate judicial review to ensure agency compliance with requirements (1) and (2).*

(4) *Judicial review must be available to ensure compliance with requirements (1) and (2).* — To ensure that administrative sanctions are imposed only in accordance with general legislative

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<sup>16</sup> See, e.g., *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475, 489 (1942); *FRC v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 277 (1933); *Wichita R.R. & Light Co. v. Public Util. Comm'n*, 260 U.S. 48, 58 (1922); *ICC v. Louisville & Nashville Ry.*, 227 U.S. 88, 91 (1913). As the Court observed in *Silver v. New York Stock Exchange*, 373 U.S. 341, 366 (1963), "[e]xperience teaches . . . that the affording of procedural safeguards, which by their nature serve to illuminate the underlying facts, in itself often operates to prevent erroneous decisions on the merits from occurring."

The ideal of accurate and impartial application of general directives to given cases is further elaborated in proscriptions of possible bias in the agency decisionmaker, see *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966), in provisions for internal agency separation of functions and independent hearing examiners, see 5 U.S.C. §§ 554(d), 556, 3105 (1970), and in prohibition of *ex parte* communications, see, e.g., *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959).

However, if an adjudicatory hearing is required but the agency is not empowered to provide one, the hearing may be provided by the reviewing court. See 1 K. DAVIS, *supra* note 2, at 448-52. Nor is a hearing required in every case of adjudication. See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). Moreover, in rule-making involving a large number of potentially affected persons the procedural requirements applicable in many cases of adjudication are often attenuated, see 5 U.S.C. § 553(b) (1970), as amended, 5 U.S.C. § 533(b) (Supp. III 1973), since no application of sanctions to a given case is immediately involved. The agency is engaged in creating a subsidiary general rule, and the question is whether the subsidiary rule is within the agency's legislative mandate. But it may sometimes be difficult for courts to make such a determination where the agency promulgating a rule is not bound by a hearing record. See, e.g., *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607 (1944); Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 205-30 (1974).

rules, judicial review is not a logical necessity. The combination of legislative supervision, popular opinion, and bureaucratic tradition might conceivably be adequate to ensure a tolerable degree of agency compliance with legislative directives. But such a view would rest on assumptions that with us appear too optimistic.<sup>17</sup> Judicial review is normally available as an additional assurance that agencies not exceed their authorized powers.<sup>18</sup> As a further corollary, agency decisional processes and findings must be adequate to permit the judge to ascertain with reasonable assurance whether the legislative directive was correctly observed in each case.<sup>19</sup>

The traditional model of administrative law thus conceives of the agency as a mere transmission belt for implementing legislative directives in particular cases.<sup>20</sup> It legitimates intrusions into private liberties by agency officials not subject to electoral control by ensuring that such intrusions are commanded by a legitimate source of authority — the legislature. Requiring agencies to show that intrusions on private liberties have been directed by the legislature provides a rationale for judicial review and also serves to define the appropriate role of the courts vis-a-vis the agencies.<sup>21</sup> The court's function is one of containment; review is directed toward keeping the agency within the directives which Congress has issued.<sup>22</sup> On the other hand, this conception of the reviewing function implies that the court is to pass upon only those matters as to which the statute provides

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<sup>17</sup> See *Fleming v. Moberly Milk Prods. Co.*, 160 F.2d 259, 265 (D.C. Cir. 1947).

<sup>18</sup> See, e.g., *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475, 489 (1942).

<sup>19</sup> See, e.g., *id.* Requirements (such as a hearing on the record) designed to promote accurate agency application of legislative directives will also facilitate judicial review, but reviewing courts have imposed on agencies additional requirements — such as detailed findings — for the explicit purpose of facilitating judicial review. See, e.g., *Citizens Ass'n of Georgetown, Inc. v. Zoning Comm'n*, 477 F.2d 402 (D.C. Cir. 1973). See also *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

<sup>20</sup> See Berle, *The Expansion of American Administrative Law*, 30 HARV. L. REV. 430, 431 (1917). The agency becomes merely an administrative board created by the state for carrying into effect the will of the state as expressed by its legislature. *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 394 (1894); F. GOODNOW, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES* 6-7 (1905); M. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 277-80 (1967).

<sup>21</sup> See L. JAFFE, *supra* note 2, at 569-75.

<sup>22</sup> *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 589 (1945). See also *Stark v. Wickard*, 321 U.S. 288, 309-10 (1944); *Waite v. Macy*, 246 U.S. 606, 610 (1918); *IOC v. Chicago, R.I. & P. Ry.*, 218 U.S. 88, 103 (1910); B. WYMAN, *THE PRINCIPLES OF ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS* 360 (1903).

ascertainable direction; all other issues of choice, whether general or interstitial, are for the agency.<sup>23</sup> By subjecting agency impositions of sanctions to judicial review in order to ensure compliance with legislative directives, the traditional model of administrative law also seeks to mediate the inconsistency between the doctrine of separation of government powers and the agencies' conspicuous combination of various lawmaking and law-enforcing functions. To the extent that the separation of powers doctrine is construed as demanding only that the exercise of power by one organ of government be subject to check by some other governmental body,<sup>24</sup> the traditional model furnishes such a check through the judiciary.

### B. *The Problem of Discretion*

Vague, general, or ambiguous statutes create discretion and threaten the legitimacy of agency action under the "transmission belt" theory of administrative law.<sup>25</sup> Insofar as statutes do not effectively dictate agency actions, individual autonomy is vulnerable to the imposition of sanctions at the unruléd will of executive officials, major questions of social and economic policy are determined by officials who are not formally accountable to the electorate, and both the checking and validating functions of the traditional model are impaired. However, rather than being

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<sup>23</sup> See *NLRB v. Brown*, 380 U.S. 278, 291 (1965); L. JAFFE, *supra* note 2, at 546-76. No doubt a court will be more or less willing to find a legislative directive in an imprecise statute depending on its confidence in the agency, its own view of sound policy, and the like. But, unless we are to fall into the sort of nominalism embraced by Professor Davis, see 4 K. DAVIS, *supra* note 2, at 189-240 (1958), the basic principle of enforcing statutory directives is ultimately the only consistent and coherent basis for the exercise of judicial power over the substance of policy decisions committed in the first instance to the agencies.

<sup>24</sup> See THE FEDERALIST No. 47 (J. Madison). *But cf.* pp. 1805-07 *infra*.

<sup>25</sup> Discretion has two sources. First, the legislature may endow an agency with plenary responsibilities in a given area and plainly indicate that within that area its range of choice is entirely free. Second, the legislature may issue directives that are intended to control the agency's choice among alternatives but that, because of their generality, ambiguity, or vagueness, do not clearly determine choices in particular cases.

There is a third possible source of discretion, namely legislative preclusion of judicial review of agency action. However, where the legislature has laid down directives for agency action, it has presumably intended that the agency follow such directives. Governmental officials are not free to disregard the law simply because judicial enforcement mechanisms are not available. See Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 32-34 (1967). Some writers on administrative law unfortunately do not distinguish the question of the lawful scope of administrative discretion from the question of the administrator's de facto freedom of choice. See, e.g., K. DAVIS, *DISCRETIONARY JUSTICE* 4 (1969).



the exception, federal legislation establishing agency charters<sup>26</sup> has, over the past several decades, often been strikingly broad and nonspecific,<sup>27</sup> and has accordingly generated the very conditions which the traditional model was designed to eliminate.

So long as administrative power was kept within relatively narrow bounds and did not intrude seriously on vested private interests,<sup>28</sup> the problem of agency discretion could be papered over by applying plausible labels, such as "quasi-judicial" or "quasi-legislative," designed to assimilate agency powers to those exercised by traditional governmental organs.<sup>29</sup> But after the delegation by New Deal Congresses of sweeping powers to a host of new agencies under legislative directives cast in the most general terms, the broad and novel character of agency discretion could no longer be concealed behind such labels.<sup>30</sup>

Defenders flaunted the breadth of the discretion afforded the new agencies by Congress,<sup>31</sup> maintaining that such discretion was necessary if the agencies were to discharge their planning and managerial functions successfully and restore health to the various

<sup>26</sup> See, e.g., Communications Act of 1934, § 307(a), 47 U.S.C. § 307(a) (1970) (FCC to grant licenses in "public convenience, interest, or necessity"); Federal Aviation Act of 1958, §§ 102, 401(d), 49 U.S.C. §§ 1302, 1371(d) (1970).

<sup>27</sup> The factors responsible for this lack of specificity are (1) the impossibility of specifying at the outset of new governmental ventures the precise policies to be followed; (2) lack of legislative resources to clarify directives; (3) lack of legislative incentives to clarify directives; (4) legislators' desire to avoid resolution of controversial policy issues; (5) the inherent variability of experience; (6) the limitations of language. See pp. 1695-96 *infra*.

<sup>28</sup> For example, the mandate first given the Interstate Commerce Commission was comparatively limited, see 1 I. SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION* 11-35 (1931), and strictly construed by the courts, see, e.g., *ICC v. Alabama Midland Ry.*, 168 U.S. 144 (1897); *ICC v. Cincinnati, N.O. & T.P. Ry.*, 167 U.S. 479 (1897). The Congress made relatively discrete successive additions to the Commission's powers in response to concrete difficulties, see H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* 27-35 (1962); G. KOLKO, *RAILROADS AND REGULATION* 1877-1926, at 84-230 (1965); 1 I. SHARFMAN, *supra*, at 35-281, and the delegations were given a limiting construction by the courts, see, e.g., *Intermountain Rate Cases*, 234 U.S. 476 (1914).

<sup>29</sup> See R. CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* 45-62, 66 (1941).

<sup>30</sup> As Justice Jackson remarked with characteristic trenchancy:

The mere retreat to the qualifying "quasi" is implicit with confession that all recognized classifications have broken down, and "quasi" is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.

*FTC v. Ruberoid Co.*, 343 U.S. 470, 487-88 (1952) (dissent).

<sup>31</sup> Defenders of the new agencies also resisted efforts to analogize them to judicial or legislative bodies, contending that the agencies represented a unique amalgam of governmental powers that was needed in order to resolve the problems of a complex economy. See J. LANDIS, *THE ADMINISTRATIVE PROCESS* 10-16, 46-50 (1938).

sectors of the economy for which they were responsible.<sup>32</sup> Given the assumption that the agencies' role was that of manager or planner with an ascertainable goal,<sup>33</sup> "expertise" could plausibly be advocated as a solution to the problem of discretion if the agency's goal could be realized through the knowledge that comes from specialized experience. For in that case the discretion that the administrator enjoys is more apparent than real. The policy to be set is simply a function of the goal to be achieved and the state of the world.<sup>34</sup> There may be a trial and error process in finding the best means of achieving the posited goal, but persons subject to the administrator's control are no more liable to his arbitrary will than are patients remitted to the care of a skilled doctor.<sup>35</sup> This analysis underlay the notion that administrators were not political, but professional, and that public administration has an objective basis.<sup>36</sup> It also supported arguments by New Deal defenders that it would be unwise for the Congress to lay down detailed prescriptions in advance, and intolerably inefficient to require administrators to follow rigid judicial procedures.<sup>37</sup>

However, many lawyers remained unpersuaded, and attacked the delegation of broad discretion to administrators as violative of the principles of separation of powers and formal justice which

<sup>32</sup> See, e.g., *id.* at 10-16, 46-50, 67-70.

<sup>33</sup> Two basic types of directives may be distinguished: rules and goals. See R. UNGER, *KNOWLEDGE AND POLITICS* (1975); M. WEBER, *supra* note 9, at xl-xlii; Kennedy, *supra* note 15. A rule directs agency disposition of some classes of cases without resort to intermediate premises. See, e.g., *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607 (1944). A goal provides that a given condition is to be obtained or value maximized. In order to decide a particular case, it is necessary to know the likely effects of the various alternatives on the realization of the goal specified and make a prudential judgment as to which alternative is best calculated to achieve the designated objective. See, e.g., *Federal Aviation Act of 1958*, § 102(f), 49 U.S.C. § 1302(f) (1970) (development of civil aeronautics). There are mixed cases, of course, as where a rule is applied by reference to some presumed goal it is to serve. See, e.g., *Board of Governors v. Agnew*, 329 U.S. 441 (1947). See also Kennedy, *supra* note 15.

<sup>34</sup> See J. LANDIS, *supra* note 31, at 10-17, 33, 39, 98-99; *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194-95 (1941) (expert NLRB to determine measures that will best secure goal of "industrial peace" by "empiric process of administration").

<sup>35</sup> See PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, *REPORT WITH SPECIAL STUDIES* 324 (1937); J. LANDIS, *supra* note 34, at 99. Courts often accepted this view. See, e.g., *ICC v. Chicago, R.I. & P. Ry.*, 218 U.S. 88, 102 (1910). ("[The ICC's powers] are expected to be exercised in the coldest neutrality. . . . And the training that is required, the comprehensive knowledge which is possessed, guards or tends to guard against the accidental abuse of its powers. . . .").

<sup>36</sup> For a brief history of the idea that public administration is an apolitical science, see M. VILE, *supra* note 20, at 277-80. See also authorities cited in Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 *STAN. L. REV.* 1041, 1057 n.74 (1975).

<sup>37</sup> See J. LANDIS, *supra* note 31, at 10-24, 46, 91-100.

the traditional model was designed to serve.<sup>38</sup> In theory the traditional model might have been effectively used to curtail the discretionary exercise by agencies of broadly delegated powers through a rigorous application of the non-delegation doctrine to require greater specificity in legislative directives. This solution, however, proved unworkable because of difficulties in implementing the doctrine<sup>39</sup> and because of the institutional hazards involved in persistent, wholesale invalidation by courts of broad legislative directives. Instead, the courts, reacting in part to the Administrative Procedure Act and its history, turned to a number of alternative (and more enduring) techniques to control the exercise of administrative discretion.

First, by undertaking a more searching scrutiny of the substantiality of the evidence supporting agency factfinding<sup>40</sup> and by insisting on a wider range of procedural safeguards,<sup>41</sup> the courts have required agencies to adhere more scrupulously to the norms of the traditional model. This judicial stance has promoted more accurate application of legislative directives. Additionally, more rigorous enforcement of procedural requirements, such as hearings, may have influenced agencies' exercise of their discretion and may have served as a partial substitute for political safeguards by, for example, facilitating input from affected interests. These developments may also have reduced effective agency power by affording litigating tools to resistant private interests and by providing judges with an additional basis for setting aside decisions.<sup>42</sup>

A second technique which was developed to control the broad discretion granted by New Deal legislation was the requirement of reasoned consistency in agency decisionmaking. Under this doctrine, an agency might be required to articulate the reasons for reaching a choice in a given case even though the loose texture of

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<sup>38</sup> See, e.g., McGuire, *Federal Administrative Decisions and Judicial Review Thereof*; or, *Bureaucracy Under Control*, 48 VA. STATE B.J. 301 (1936). Political scientists also perceived a fundamental conflict between the justification for administrative discretion and received political theory. See Wolfe, *Will and Reason in Economic Life*, 1 J. SOC. PHIL. 218, 238-39 (1936) (arguing that the private autonomy the traditional model was designed to protect and the economic efficiency that the broad delegation of discretion to administrative agencies is designed to promote were inconsistent and that a system which failed to exalt the goal of economic efficiency was doomed to failure). See also J. RAWLS, *supra* note 15, at 243-51; note 31 *supra*.

<sup>39</sup> See pp. 1695-97 *infra*.

<sup>40</sup> See, e.g., *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

<sup>41</sup> See, e.g., *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

<sup>42</sup> See *id.* at 46; *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 576-77 (1939); *Morgan v. United States*, 304 U.S. 1 (1938).

its legislative directive allowed a range of possible choices.<sup>43</sup> Courts might also impose the further requirement that choices over time be consistent,<sup>44</sup> or at least that departures from established policies be persuasively justified, particularly where significant individual expectation interests were involved.<sup>45</sup> Again, these requirements were not directly addressed to the substance of agency policy.<sup>46</sup> Their aim was, and is, simply to ensure that the agency's action is rationally related to the achievement of some permissible societal goal,<sup>47</sup> and to promote formal justice in order to protect private autonomy.<sup>48</sup> Yet these requirements may also have an impact on the substance of agency policy. A requirement of reasoned consistency may hobble the agency in adapting to new contingencies<sup>49</sup> or in dealing with an individual case of abuse whose basis is not easily susceptible to generalized statements,<sup>50</sup> and such a requirement may provide additional tools for litigants resisting agency sanctions and for judges seeking procedural grounds for setting aside dubious decisions.

Third, courts began to demand a clear statement of legislative

<sup>43</sup> See, e.g., *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 166-69 (1962); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 196-97 (1941).

<sup>44</sup> In particular, the agency is bound to follow its own regulations. See, e.g., *Hammond v. Lenfest*, 398 F.2d 705, 715 (2d Cir. 1968); Note, *Violations by Agencies of Their Own Regulations*, 87 HARV. L. REV. 629 (1974). However, where an agency has chosen to proceed through case-by-case adjudication, the courts have been far more reluctant to restrain agency flexibility by even minimal standards of decisional consistency. See, e.g., *NLRB v. Bell Aerospace Co., Div. of Textron, Inc.*, 416 U.S. 267, 292-95 (1974). See also note 143 *infra*.

<sup>45</sup> See *NLRB v. Guy F. Atkinson Co.*, 195 F.2d 141, 148-50 (9th Cir. 1952).

<sup>46</sup> The agency's articulation of reasons may, however, be an essential prelude to a reviewing court's determination that the choice made is so plainly unreasonable on the particular facts as to constitute an abuse of discretion. *Citizens Ass'n of Georgetown, Inc. v. Zoning Comm'n*, 477 F.2d 402, 408 (D.C. Cir. 1973); *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 596-98 (D.C. Cir. 1971). Invalidation of agency action as an abuse of discretion should itself be viewed as part of the court's central function of confining agency action within the bounds of legislative directives, for it is logical to imply in a legislative delegation of discretion a directive that it be rationally exercised.

<sup>47</sup> See *Citizens Ass'n of Georgetown, Inc. v. Zoning Comm'n*, 477 F.2d 402, 408 (D.C. Cir. 1973); *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 596 (D.C. Cir. 1971).

<sup>48</sup> For further discussion of formal justice, see pp. 1698-1702 *infra*.

<sup>49</sup> But see Note, *supra* note 44, at 642-50.

<sup>50</sup> One suspects that the real reason why the SEC refused to approve stock transactions by management in the famous *Chenery* cases and yet approved similar transactions by the management of other companies was the firm belief of SEC staff — a belief they were not equipped or prepared to prove by court procedures — that the *Chenery* were not to be trusted. Compare *In re Federal Water Serv. Corp.*, 18 S.E.C. 231 (1945), and *SEC Holding Co. Act*, Release No. 5584, Feb. 8, 1945 with *In re Cities Serv. Co.*, 26 S.E.C. 678 (1947), and *In re American States Util. Corp.*, 26 S.E.C. 718 (1947).

purpose as a means of restraining the range of agency choice when fundamental individual liberties were at risk. A paradigm example is *Kent v. Dulles*,<sup>51</sup> where Congress had made an apparently unrestricted grant of discretion to the President and Secretary of State to issue passports, and the Secretary had denied passports to persons with alleged Communist associations or sympathies. Stressing that a constitutionally protected "liberty" of travel was involved, the Court held that broad delegations of power would be construed narrowly in such cases and that, since Congress had not specifically authorized a refusal to issue passports on the grounds here asserted, the refusal was invalid. The technique has since been utilized in a variety of contexts to protect important individual interests where the agency had followed questionable procedures<sup>52</sup> or dubious substantive policies.<sup>53</sup> The technique is more discriminating than the non-delegation doctrine; it substitutes tactical excision for wholesale invalidation.<sup>54</sup>

These various techniques, which matured in the twenty years after the enactment of the APA, were well adapted to selective application, and could be utilized to trim agency powers without intruding upon the major bulk of delegated authority implicit in a statutory scheme. Through adroit application of these control techniques, an uneasy truce between administrators and judges developed into working accommodation.

### C. *The Problem of Discretion Renewed*

Today it is obvious that this working compromise has come unstuck. Judicial review once again "gives a sense of battle."<sup>55</sup> Criticism of agency policies is widespread and vociferous.<sup>56</sup>

One strand of this criticism has focused on the assertedly unlawful and abusive exercise of administrative power in areas where the traditional model had seldom applied and the private interests most directly at stake had not enjoyed its protections. These areas include interests in the continuation of advantageous relations with the government (such as the receipt of welfare

<sup>51</sup> 357 U.S. 116 (1958).

<sup>52</sup> See, e.g., *Greene v. McElroy*, 360 U.S. 474 (1959).

<sup>53</sup> See, e.g., *Schneider v. Smith*, 390 U.S. 17, 26-27 (1968).

<sup>54</sup> A concern that administrative intrusions on private interests be explicitly authorized through the consensual mechanism of the legislature underlies both the clear statement requirement and the doctrine against delegation. The clear statement technique could be thought of as operating on a sliding scale: the more vital the individual liberty infringed, the more explicit must be the expression of consent. Cf. notes 144 & 146 *infra*.

<sup>55</sup> J. LANDIS, *supra* note 31, at 123.

<sup>56</sup> See pp. 1684-86 *infra*.

benefits and eligibility to bid on government contracts) that had not been regarded as within the realm of legally protected liberty or property,<sup>57</sup> and interests in avoiding sanctions imposed by agencies (such as prison authorities and school officials) that had hitherto been accorded considerable immunity from judicial review. Critics have asserted that such interests represent an important aspect of private autonomy and that they are at least as deserving of protection against unauthorized official power as traditional liberty and property interests.<sup>58</sup> The obvious solution is the extension of the traditional model to protect these additional classes of private interests.<sup>59</sup>

A second theme of contemporary criticism of agency discretion has been the agencies' asserted failure affirmatively to carry out legislative mandates and to protect the collective interests that administrative regimes are designed to serve. The possibility of such failure was no concern of the traditional model, which was directed at protecting private autonomy by curbing agency power. It was simply assumed that agency zeal in advancing the "unalloyed, nonpolitical, long-run economic interest of the general public" would be assured by the professionalism of administrators<sup>60</sup> or by political mechanisms through which the administrative branch would "eternally [refresh] its vigor from the stream of democratic desires."<sup>61</sup>

Experience has withered this faith. To the extent that belief in an objective "public interest" remains, the agencies are accused

<sup>57</sup> See pp. 1717-18, 1724-25 *infra*.

<sup>58</sup> See, e.g., K. DAVIS, *supra* note 25; Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Reich, *The New Property*, 73 YALE L.J. 733 (1964).

<sup>59</sup> See pp. 1717-22 *infra*. Reich urges the extension of the procedural safeguards of the traditional model as a means of preventing official action contrary to statute or constitution, whereas Davis stresses the supplementary aim of modulating the agency's exercise of discretion. See sources cited at note 58 *supra*.

<sup>60</sup> Lewis, *The "Consumer" and "Public" Interests Under Public Regulation*, 46 J. POL. ECON. 97, 105 (1938). This article is representative of much of the literature of the period which assumes the existence of an objective measure of desirable agency policy. See also PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, *supra* note 35, at 324; J. LANDIS, *supra* note 31, at 10-16, 26-28, 98-99.

<sup>61</sup> J. LANDIS, *supra* note 31, at 123. The potential inconsistency between professional objectivity and political responsibility as controls on administrative agencies does not appear to have concerned Landis and other advocates of administrative power, so confident were they of a harmony of interest between the goals of administrators and the interests of the public at large. In construing statutes to afford standing to private attorneys general. see *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 476-77 (1940); *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943), the courts perhaps betrayed a belief that additional means of securing agency fidelity to the commonweal were required, but these cases were exceptional.

of subverting it in favor of the private interests of regulated and client firms.<sup>62</sup> Such a "devil" theory<sup>63</sup> at least holds out the possibility of redemption. However, we have come not only to question the agencies' ability to protect the "public interest," but to doubt the very existence of an ascertainable "national welfare" as a meaningful guide to administrative decision. Exposure on the one hand to the complexities of a managed economy in a welfare state, and on the other to the corrosive seduction of welfare economics and pluralist political analysis, has sapped faith in the existence of an objective basis for social choice.

Today, the exercise of agency discretion is inevitably seen as the essentially legislative process of adjusting the competing claims of various private interests affected by agency policy.<sup>64</sup> The unravelling of the notion of an objective goal for administration is reflected in statements by judges and legal commentators that the "public interest is a texture of multiple strands,"<sup>65</sup> that it "is not a monolith," and "involves a balance of many interests."<sup>66</sup> Courts have asserted that agencies must consider all of the various interests affected by their decisions as an essential predicate to "balancing all elements essential to a just determination of the public interest."<sup>67</sup>

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<sup>62</sup> See, e.g., R. FELLMETH, *THE INTERSTATE COMMERCE OMISSION* 1-39 (1970).

<sup>63</sup> Jaffe, "Two Days to Save the World," 24 OKLA. L. REV. 17, 17 (1971). The theological terminology fits with earlier references to the "public interest" as a twentieth century replacement for God—"a sort of 'gaseous vertebrate.'" Jaffe, *The Individual Right to Initiate Administrative Process*, 25 IOWA L. REV. 485, 498 (1940).

<sup>64</sup> This view of the administrative process was first developed by political scientists. See, e.g., E. HERRING, *PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST* viii (1936). Today it is widely shared by judges, legislators, practitioners, and legal commentators. See notes 69-75 *infra*.

<sup>65</sup> *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 627 (1944) (Frankfurter, J., dissenting).

<sup>66</sup> Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 360 (1972).

<sup>67</sup> *Airline Pilots Ass'n v. CAB*, 475 F.2d 900, 905 (D.C. Cir. 1973). See also *Palisades Citizens Ass'n v. CAB*, 420 F.2d 188, 191-92 (D.C. Cir. 1969) (CAB must consider the effect of its decisions on "not only its primary interest groups but also the general public at large," for the Board "has been given the scales of public interest. It must effect a balance."). For analysis of the viability of this conception of the administrative process, see pp. 1760-90 *infra*.

The "public interest" terminology of statutes or agency decisions may be little more than a "myth" or ideology calculated to disguise the process of allocating valuable benefits, see Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227, 1235-36 (1966), or an admission of legislative inability to resolve hard questions of social choice, see K. DAVIS, *supra* note 25, at 48. "Public interest" lawyers actually represent important but unorganized private interests rather than some transcendent collective interest in the national welfare. See Lazarus & Onck, *The Regulators and the People*, 57 VA. L. REV. 1069, 1077 (1971).

Once the function of agencies is conceptualized as adjusting competing private interests in light of their configuration in a given factual situation and the policies reflected in relevant statutes, it is not possible to legitimate agency action by either the "transmission belt" theory of the traditional model, or the "expertise" model of the New Deal period. The "transmission belt" fails because broad legislative directives will rarely dispose of particular cases once the relevant facts have been accurately ascertained. More frequently, the application of legislative directives requires the agency to reweigh and reconcile the often nebulous or conflicting policies behind the directives in the context of a particular factual situation with a particular constellation of affected interests. The required balancing of policies is an inherently discretionary, ultimately political procedure. Similarly, the "economic manager" defense of administrative discretion — under which discretion was bound by an ascertainable goal, the state of the world, and an applicable technique — has been eroded by the relatively steady economic growth since World War II, which has allowed attention to be focused on the perplexing distributional questions of how the fruits of affluence are to be shared. Such choices clearly do not turn on technical issues that can safely be left to the experts.<sup>68</sup>

The sense of uneasiness aroused by this resurgence of discretion is heightened by perceived biases in the results of the agency balancing process as it is currently carried on. Critics have repeatedly asserted,<sup>69</sup> with a dogmatic tone that reflects settled opinion, that in carrying out broad legislative directives, agencies unduly favor organized interests, especially the interests of regulated or client business firms and other organized groups at the expense of diffuse, comparatively unorganized interests such as

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<sup>68</sup> See Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 472 (1954) ("[E]xpertness is not wisdom and . . . the relative ordering of values in a society — the ultimate problem of choosing between alternative courses of action — is something we do after the expert has completed his task of collecting data, describing, and, to a limited extent, predicting."). See also Reich, *supra* note 67, at 1235.

<sup>69</sup> See, e.g., sources cited at note 70 *infra*; *Moss v. CAB*, 430 F.2d 891, 902 (D.C. Cir. 1970); Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543, 550 (D.C. Cir. 1969); Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525 (1972); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).



consumers,<sup>70</sup> environmentalists,<sup>71</sup> and the poor.<sup>72</sup> In the midst of a "growing sense of disillusion with the role which regulatory agencies play,"<sup>73</sup> many legislators, judges, and legal and economic commentators have accepted the thesis of persistent bias in agency policies. At its crudest, this thesis is based on the "capture" scenario, in which administrations are systematically controlled,<sup>74</sup> sometimes corruptly,<sup>75</sup> by the business firms within their orbit of responsibility, whether regulatory or promotional. But there are more subtle explanations of industry orientation, which include the following:<sup>76</sup>

*First.* — The division of responsibility between the regulated firms, which retain primary control over their own affairs, and the administrator, whose power is essentially negative and who is dependent on industry cooperation in order to achieve his objectives, places the administrator in an inherently weak position. The administrator will, nonetheless, be held responsible if the industry suffers serious economic dislocation. For both of these reasons, he may pursue conservative policies.<sup>77</sup>

*Second.* — The regulatory bureaucracy becomes "regulation minded." It seeks to elaborate and perfect the controls it exercises over the regulated industry. The effect of this tendency, particularly in a regime of limited entry, is to eliminate actual and potential competition and buttress the position of the established firms.<sup>78</sup>

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<sup>70</sup> See, e.g., S. REP. NO. 93-883, 93d Cong., 2d Sess. 1-2, 6-7 (1974) (Consumer Protection Agency Act); S. REP. NO. 93-792, 93d Cong., 2d Sess. 1, 4-7 (1974) (same); H.R. REP. NO. 93-962, 93d Cong., 2d Sess. 6 (1974) (Consumer Protection Act of 1974).

<sup>71</sup> See, e.g., W. ROSENBAUM, *THE POLITICS OF ENVIRONMENTAL CONCERN* (1973).

<sup>72</sup> See, e.g., Bonfield, *Representation for the Poor in Federal Rulemaking*, 67 MICH. L. REV. 511 (1969).

<sup>73</sup> Wright, Book Review, 81 YALE L.J. 575, 579 (1972).

<sup>74</sup> See, e.g., G. SCHUBERT, *THE PUBLIC INTEREST* 119 (1960); Green & Nader, *Economic Regulation vs. Competition: Uncle Sam the Monopoly Man*, 82 YALE L.J. 871, 876 (1973). See also J. LANDIS, *supra* note 31, at 36-37; Landis, *The Challenge to Traditional Law in the Rise of Administrative Law*, 13 MISS. L.J. 724, 725 (1941); Schwartz, *supra* note 68.

<sup>75</sup> See, e.g., R. FELLMETH, *supra* note 62, at 1-39.

<sup>76</sup> The textual analysis focuses on regulatory administration; the congruence of interest between promotional agencies and the interest of those whose activities are to be promoted—the Highway Administration and construction firms, for example—is obvious.

<sup>77</sup> See 2 A. KAHN, *THE ECONOMICS OF REGULATION* 11-14 (1971); Jaffe, *Federal Regulatory Agencies in Perspective: Administrative Limitations in a Political Setting*, 11 B.C. IND. & COM. L. REV. 565, 566 (1970); Noll, *The Economics and Politics of Regulation*, 57 VA. L. REV. 1016 (1971).

<sup>78</sup> Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1113-19 (1954).

*Third.* — The resources — in terms of money, personnel, and political influence — of the regulatory agency are limited in comparison to those of regulated firms. Unremitting maintenance of an adversary posture would quickly dissipate agency resources. Hence, the agency must compromise with the regulated industry if it is to accomplish anything of significance.<sup>79</sup>

*Fourth.* — Limited agency resources imply that agencies must depend on outside sources of information, policy development, and political support. This outside input comes primarily from organized interests, such as regulated firms, that have a substantial stake in the substance of agency policy and the resources to provide such input. By contrast, the personal stake in agency policy of an individual member of an unorganized interest, such as a consumer, is normally too small to justify such representation.<sup>80</sup> Effective representation of unorganized interests might be possible if a means of pooling resources to share the costs of underwriting collective representation were available. But this seems unlikely since the transaction costs of creating an organization of interest group members increase disproportionately as the size of the group increases. Moreover, if membership in such an organization is voluntary, individuals will not have a strong incentive to join, since if others represent the interests involved, the benefits will accrue not only to those participating in the representation, but to nonparticipants as well, who can, therefore, enjoy the benefits without incurring any of the costs (the free rider effect).<sup>81</sup> As a somewhat disillusioned James Landis wrote in 1960, the result is industry dominance in representation, which has a "daily machine-gun like impact on both [an] agency and its staff" that tends to create an industry bias in the agency's outlook.<sup>82</sup>

These various theses of systematic bias in agency policy are not universally valid. Political pressures and judicial controls may force continuing agency adherence to policies demonstrably inimical to the interests of the regulated industry, as in the case of FPC regulation of natural gas producer prices.<sup>83</sup> Moreover,

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<sup>79</sup> See Beislein, *The Commissions Have Failed*, in *THE INDEPENDENT REGULATORY AGENCIES* 61 (L. Solomon ed. 1959); Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 *MICH. L. REV.* 111, 141 (1972); Jaffe, *supra* note 77, at 566.

<sup>80</sup> See sources cited at note 70 *supra*; G. STIGLER & M. COHEN, *CAN REGULATORY AGENCIES PROTECT THE CONSUMER?* 15 (1971); Gellhorn, *supra* note 66, at 377-78.

<sup>81</sup> See generally M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965); R. WOLFF, *THE POVERTY OF LIBERALISM* (1968).

<sup>82</sup> J. LANDIS, *REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT* 71 (1960).

<sup>83</sup> See Breyer & MacAvoy, *The Natural Gas Shortage and the Regulation of Natural Gas Producers*, 86 *HARV. L. REV.* 941 (1973).

the fact that agency policies may tend to favor regulated interests does not in itself demonstrate that such policies are unfair or unjustified, since protection of regulated interests may be implicit in the regulatory scheme established by Congress.<sup>84</sup> Nonetheless, the critique of agency discretion as unduly favorable to organized interests — particularly regulated or client firms — has sufficient power and verisimilitude to have achieved widespread contemporary acceptance.<sup>85</sup>

The traditional model provides scant assistance in dealing with the problem of agencies' failure to exercise discretion under broad statutory directives so as to discharge their responsibilities equitably and effectively. The traditional model is an essentially negative instrument for checking governmental power; it does not touch "the affirmative side" of government "which has to do with the representation of individuals and interests" and the development of governmental policies on their behalf.<sup>86</sup> Thus the protections of the traditional model have normally applied only to formal agency proceedings eventuating in sanctions on regulated firms.<sup>87</sup> Those interests that have assertedly been disregarded by the agencies — notably beneficiaries of the administrative scheme — have not been subject to sanctions and thus have normally not been entitled to invoke the protections of the traditional model.<sup>88</sup> Many of the policy decisions most strongly attacked by agency critics — the failure to prosecute vigorously,<sup>89</sup> the working out of agency policy by negotiation with regulated firms,<sup>90</sup> the quiet settlement of litigation once initiated — take place through informal procedures where the traditional controls have not normally applied.<sup>91</sup>

In view of the traditional model's apparent impotence to redress asserted bias in the exercise of agency discretion, critics have

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<sup>84</sup> See Federal Aviation Act § 102(f), 49 U.S.C. § 1302(f) (1970); Jaffe, *supra* note 78, at 1108-09; Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183 (1973).

<sup>85</sup> See notes 69-76 *supra*.

<sup>86</sup> Fuchs, *Concepts and Policies in Anglo-American Administrative Law Theory*, 47 YALE L.J. 538, 540 (1938). See also ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PRACTICE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES 76 (1941) ("[Judicial review] is adapted chiefly to curbing excess of power, not toward compelling its exercise.").

<sup>87</sup> See pp. 1717-18, 1752 *infra*.

<sup>88</sup> See pp. 1717-18, 1724-26, 1752 *infra*.

<sup>89</sup> See *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971).

<sup>90</sup> See *Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970).

<sup>91</sup> See L. JAFFE, *supra* note 2, at 418-19 (reviewable orders require "some formal characteristics"). But see *Medical Comm. for Human Rights v. SEC*, 432 F.2d 659, 665-72 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972) (SEC "no action" determination held reviewable). See generally K. DAVIS, *supra* note 25.

sought alternative solutions. Part II of this Article will examine the most promising among these alternatives, and explore their limitations at the level both of principle and practical application. Part III will then analyze the courts' renewed efforts to control administrative discretion by insisting on procedures designed to promote the effective participation of all affected interests in the process of agency decision. The ultimate problem is to control and validate the exercise of essentially legislative powers by administrative agencies that do not enjoy the formal legitimation of one-person one-vote election.

## II. ALTERNATIVE RESPONSES TO THE PROBLEM OF AGENCY DISCRETION

A number of solutions have been suggested to deal with the problems of systematic bias and agency "failure" in the existing process of administrative decisionmaking. Among these alternatives are: deregulation and abolition of agencies; enforcement of the doctrine against delegation of legislative power; a requirement that agencies crystallize their exercise of discretion through standards; and adoption of allocational efficiency as a substantive yardstick for agency decisions.

The first three of these alternatives seek to legitimate policy outcomes by reference to the institutional processes that produce them: respectively, the market, the legislature, and a revised process of agency decisionmaking. The criterion of allocational efficiency is a surrogate process solution in that it seeks to replicate the results that would be achieved through market exchange if imperfections in the market could be eliminated. This resort to process solutions is predictable when faith in objective standards for social choice has etiolated and the problem of decision is viewed as the accommodation of potentially conflicting private interests. In such a context, specification (and legitimation) of policy outcomes can only be accomplished by adopting a given (and authoritative) procedure for resolving the disparate private interests at stake.<sup>92</sup> Each of the four alternatives offers some promise in ameliorating the perceived shortcomings in agencies' exercise of discretion in policy choice. But none approaches a complete solution, and they are in considerable degree mutually inconsistent.<sup>93</sup>

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<sup>92</sup> See J. RAWLS, *supra* note 15, at 83-90; Heymann, *The Problem of Coordination: Bargaining and Rules*, 86 HARV. L. REV. 797 (1973).

<sup>93</sup> *But see* pp. 1809-10 *infra* (suggesting that a functional analysis might distribute these alternative techniques, matching them with differing types of agency functions).

*A. Abolition of Agencies:  
The Return to the Market*

A short answer to the problem of agency discretion is to abolish the agency and remit the agency's functions to the private market economy (perhaps supplemented by court-enforced liability rules). This solution is frequently proposed as a means of promoting allocational efficiency and private autonomy.

In working terms, allocational efficiency consists in the maximization, given existing resources, of the total output of goods and services so that no more of any one commodity can be produced without producing less of some other commodity.<sup>94</sup> Critics of regulation urge that, even though unregulated markets are characterized by various imperfections which hinder the attainment of allocational efficiency, administrative agencies often function even more imperfectly<sup>95</sup> because they utilize regulatory controls that restrict competition among firms and limit consumer choice.<sup>96</sup> Critics charge that, at best, administrative regulation is completely ineffective, and thus a waste of resources,<sup>97</sup> or that the agency's task could be better carried out by the courts.<sup>98</sup>

The deregulation argument based on allocational efficiency has undoubted merit with regard to particular administrative regimes. For example, reduction of entry and price controls in the

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<sup>94</sup> There will be numerous sets of commodities with varying proportions of particular goods and services which meet this condition. The particular set produced will reflect consumer preferences as expressed through purchases within existing market structures and the existing distribution of income. Deregulation, which will change the market structure in which goods are traded, is thus likely to have interacting allocational and distributional effects. See pp. 1706-09 *infra*.

<sup>95</sup> See, e.g., Winter, *Economic Regulation vs. Competition: Ralph Nader and Creeping Capitalism*, 82 YALE L.J. 890, 892-94 (1973).

<sup>96</sup> Administrative limitations on entry and prices are most frequently attacked as inefficient economically. See, e.g., THE PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, A NEW REGULATORY FRAMEWORK: REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES (1971); R. FELLMETH, *supra* note 62 (*passim*); R. NOLL, REFORMING REGULATION (1971); Breyer & MacAvoy, *supra* note 83; Green & Nader, *supra* note 74. *But cf.* Kitch, Isaacson & Kasper, *The Regulation of Taxicabs in Chicago*, 14 J. LAW & ECON. 285 (1971). It has also been argued that health and safety regulation may impair economic efficiency. See Peltzman, *An Evaluation of Consumer Protection Legislation: The 1962 Drug Amendments*, 81 J. POL. ECON. 1049, 1068-90 (1973). *But see* Green & Moore, *Winter's Discontent: Market Failure and Consumer Welfare*, 82 YALE L.J. 903, 904 n.4 (1973).

<sup>97</sup> See, e.g., G. STIGLER & M. COHEN, CAN REGULATORY AGENCIES PROTECT THE CONSUMER? 10 (1971); Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 87-89 (1970); Stigler & Friedland, *What Can Regulators Regulate? The Case of Electricity*, 5 J. LAW & ECON. 1 (1962).

<sup>98</sup> See, e.g., Posner, *supra* note 97, at 87-89.

transportation sector seems most desirable.<sup>99</sup> But dismantling administrative agencies is not a prescription of universal validity. Even advocates of deregulation favor some minimum of regulation to ensure a competitive market structure<sup>100</sup> and acknowledge the necessity for governmental provision of public goods such as dams, roads, and national defense. An official apparatus is also needed to raise governmental revenues and to redistribute income in accordance with political dictates. The discharge of even such a minimum level of governmental function would, however, require a sizeable administrative bureaucracy enjoying considerable discretion.

Moreover, even if we limit our perspective to administrative regulation of private business conduct other than anticompetitive practices, sound analysis would not support wholesale abolition.<sup>101</sup> What is required in each particular case is a detailed assessment of the likely imperfections of given markets as contrasted with the operation of regulatory or promotional regimes.<sup>102</sup> While some such studies have made a persuasive case for deregulation in fields such as price control of natural gas production,<sup>103</sup> it is doubtful that one can generalize from these cases to other areas of regulation.

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<sup>99</sup> See Kohlmeier, *Regulatory Focus: Rock Island Monument to Failure*, 6 NAT'L J. REP. 1892 (1974); Kohlmeier, *Regulatory Focus: ICC Is Confident of Its Future*, 6 NAT'L J. REP. 1743 (1974); Malbin, *Transportation Report: Rail Reform Issue Divides Carriers, Major Shippers*, 6 NAT'L J. REP. 171 (1974); R. FELLMETH, *supra* note 62.

<sup>100</sup> See, e.g., Green & Nader, *supra* note 74, at 884-85. Even if such regulation were replaced by judicial action, there might well be need for continued reliance on administrative agencies, such as the Antitrust Division of the Justice Department, to institute litigation.

<sup>101</sup> Some advocates of deregulation would abolish selected agency functions while actually extending others. For example, in Green & Nader, *supra* note 74, the authors propose to abolish, or at least greatly curtail, the scope of administrative regulation over entry and pricing in particular sectors (such as transportation) but advocate expanded regulation in such areas as consumer protection, occupational health and safety, and the environment. As Professor Winter correctly points out, see Winter, *supra* note 95, at 894-900, there is no a priori line dividing malign market regulation from benign health and welfare regulation. Both types of regulation limit market competition, restricting the goods and services that can be offered for consumer choice. The decision whether to maintain regulation in a given field must be determined on the basis of a particularized assessment of the likely gains from regulation versus the probable losses from restricting competition, and cannot be made by assuming that certain broad categories of regulation are inevitably beneficial or malign.

<sup>102</sup> See Calabresi, *Transaction Costs, Resource Allocation and Liability Rules — A Comment*, 11 J. LAW & ECON. 67 (1968). There is debate over the allocational effects of regulation in a given sector, compare Peltzman, *supra* note 96, with Green & Moore, *supra* note 96 (FDA regulation of new drugs).

<sup>103</sup> See, e.g., Breyer & MacAvoy, *supra* note 83.

There are many categories of cases where administrative regulation seems clearly warranted by considerations of allocational efficiency. For example, some administrative control of bona fide natural monopolies seems inescapable. Collectively managed controls may also be necessary to deal effectively with many types of economic externalities. While the problems of air and water pollution might theoretically be dealt with entirely through private liability rules administered by the courts, the difficulties and drawbacks involved in implementing such a scheme<sup>104</sup> have led responsible observers to endorse centralized and specialized administrative direction as an essential element in dealing with the problems of environmental degradation.<sup>105</sup> And in a complex industrial society permeated by technological changes with significant second and third order consequences, one may responsibly come to the same judgment in many other fields.

A second category of cases, such as FCC control over entry and programming in broadcasting, presents a less compelling, but still respectable, case for regulation. The finite nature of the radiomagnetic spectrum and the problem of broadcast interference call for some system of allocating frequencies. However, a program of regulation through licensure, directed in part at program content, is not inevitable. Periodic auctions of broadcast licenses,<sup>106</sup> or the creation of transferable property rights in the spectrum,<sup>107</sup> are allocational alternatives that might better serve existing viewer tastes without the troublesome prospect of gov-

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<sup>104</sup> Some of the more obvious difficulties with exclusive reliance on private liability rules are as follows: (A) the diffuse nature of the harm caused and the operation of the free rider effect may result in an absence of adequate incentives for the invocation of private liability rules; (B) judicially applied liability rules may not be effective in dealing with degradation caused by the interplay of effects resulting from the conduct of many actors; (C) judicial remedies may not provide adequate prophylaxis against future degradation, particularly where long term, highly diffused effects are involved or where planning activities such as land use zoning are required; (D) specialized knowledge may be required; (E) differing applications by judges and juries of liability rules may have distorting effects on competition; (F) it may be difficult to secure adequate representation of the interests of future generations. See generally J. KRIER, *ENVIRONMENTAL LAW AND POLICY* 221-23 (1971). But cf. R. NOZICK, *ANARCHY, STATE AND UTOPIA* 79-81 (1974) (suggesting the use of protective associations to allow collective action to surmount the need for administrative control).

<sup>105</sup> See, e.g., Jaffe, *Ecological Goals and the Ways and Means of Achieving Them*, 75 W. VA. L. REV. 1, 17-21 (1972); Jaffe, *The Administrative Agency and Environmental Control*, 20 BUFF. L. REV. 231 (1970).

<sup>106</sup> See L. JAFFE & N. NATHANSON, *ADMINISTRATIVE LAW: CASES AND MATERIALS* 577-78 (3d ed. 1968).

<sup>107</sup> See De Vany, Eckert, Meyers, O'Hara & Scott, *A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study*, 21 STAN. L. REV. 1499 (1969).

ernmental control over program content. But there are countervailing considerations. The preference-shaping impact of television on audiences, especially children, may afford a ground for governmental regulation based on considerations independent of allocational efficiency.<sup>108</sup> The limited number of channels may generate a "bunching" effect, concentrating programming content into areas desired by large groups with congruent interests, leaving significant segments of the population without service.<sup>109</sup> Moreover, the "fairness doctrine"<sup>110</sup> implicates larger social concerns that might not necessarily be served adequately by alternatives to regulation. The choice between regulation and alternatives geared to market mechanisms is thus fairly debatable, as it may often be where the activity in question has significant preference-shaping or distributional effects.

In a third category of cases, the arguments for deregulation are compelling. Entry and pricing controls for motor carriers and, to a lesser degree, transportation in general are good examples. But in such cases the capacity of the judiciary to facilitate the adoption of sounder policies may be limited. To be sure, the judges could and should construe more narrowly the margins of regulatory authority where the case for its further extension is doubtful,<sup>111</sup> but legislative action will be required to accomplish any major degree of deregulation. Those groups benefitting from regulatory regimes that limit competition have a strong vested interest in continuing the status quo<sup>112</sup> and may often be more vocal and better organized than the more diffuse interests that may benefit from abolition. The agency marked for extinction will fight abolition relentlessly.<sup>113</sup> Accordingly, even in those cases

<sup>108</sup> However, a lack of consensus regarding "proper" preferences may justify a laissez-faire policy. See M. Roberts, *How Could the Content of Entertainment Television Be Determined: Self-Regulation and the Alternatives* (1974) (on file with the author).

<sup>109</sup> A "bunching" phenomenon in radio programming seems to indicate that a substantial increase in the number of television channels might not produce a commensurate increase in program quality or variety. See Note, *Administrative Law — Communications — Developing Standards for Diversification of Broadcasting Formats*, 52 TEXAS L. REV. 558 (1974).

<sup>110</sup> See generally *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

<sup>111</sup> For example, agency imposition of limitations on competition should be more carefully scrutinized by reviewing courts. See *Pillai v. CAB*, 485 F.2d 1018 (D.C. Cir. 1973). Unfortunately, courts tend to construe agencies' regulatory authority broadly without considering whether additional regulation is warranted by considerations of allocational efficiency. See *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954).

<sup>112</sup> See, e.g., Thorp, *Transportation Report — Carrier Support for Status Quo Helps ICC Resist Pressures for Major Overhaul*, 5 NAT'L J. REP. 103 (1973).

<sup>113</sup> For example, proposals to strip the ICC of its powers over entry and pricing



where analysis supports deregulation, prudence may sometimes dictate a "second best" solution of rendering more tolerable the exercise of a degree of administrative discretion that ought ideally to be abolished.<sup>114</sup>

In addition to the economic argument for deregulation, it has been asserted that substituting the private market for administrative regulation would advance private autonomy by replacing official discretion with the impersonal rules of market exchange.<sup>115</sup> But this libertarian argument for deregulation likewise does not justify wholesale dismantling of our administrative apparatus. Whatever the abstract appeal of such arguments, deregulation may in practice merely lead to a transfer of discretionary power over policy from administrative agencies to large and highly organized private interest groups. In a world characterized by concentrations of economic and social power, a regime of private ordering may simply mirror disparities between organized and unorganized interests, and a measure of administrative intervention may therefore be necessary to counterbalance such disparities. The imperfections of the private market are not always the lesser of two evils. Deregulation, while an important principle, is not a universal prescription.

### *B. Reviving the Doctrine Against Delegation*

A second potential solution to the problem of administrative discretion would be more precise legislative formulation of directives to agencies. If the legislature were to specify in detail the policies to be followed by administrators, the traditional model would operate to reduce the effective range of administrative dis-

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in surface transportation have thus far failed completely in spite of the most compelling arguments for such deregulation. See R. FELLMETH, *supra* note 62; THE PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, *supra* note 96; Thorp, *supra* note 112.

<sup>114</sup> Of course such a solution makes it even more unlikely that deregulation could be accomplished. Indiscriminate efforts at reforming the administrative process may perpetuate an undesirable scheme of regulation that might otherwise have been abolished.

<sup>115</sup> See F. VON HAYEK, THE CONSTITUTION OF LIBERTY 12-13 (1960). Compare R. NOZICK, *supra* note 104, at 149-294. The private market may be seen not only as the most perfect regime of liberty (as defined by Hayek) but also as a perfect system of decisional representation, in that each individual's preferences are automatically translated into effective demands on appropriate resources. However, under this system an individual's preferences are effectively weighted by the wealth at his command. In practice, actual regimes of private ordering have produced substantial differences in wealth and other differences in bargaining power that may distort the effect of asserted "impersonal" rules and lead to domination of some groups by others. See Kennedy, *supra* note 15, at 377-91 (discussing implications for the legal system).

cretion. Choice among competing interests and social values would be exercised by the presumptively most responsive governmental body rather than by nonelected bureaucrats.<sup>116</sup>

The nondelegation doctrine grows out of the contract notion of government based on consent,<sup>117</sup> and is premised on the belief that discretionary power is, in effect, political power which must be limited to the politically responsible organs of government.<sup>118</sup> Responsible administrative decisionmaking, therefore, can only be ensured by precise legislative directives.<sup>119</sup> These considerations, together with dissatisfaction over the discretionary policy choices made by administrators, have recently led commentators, including Professor Theodore Lowi and Judge Skelly Wright, to advocate vigorous judicial enforcement of the nondelegation doctrine to prohibit broad legislative delegations to agencies.<sup>120</sup> Professor Lowi, for example, calls for judicial extension of "the still valid but universally disregarded *Schechter* rule"<sup>121</sup> to declare "invalid as unconstitutional any delegation of power to an administrative agency that is not accompanied by clear standards of implementation."<sup>122</sup>

<sup>116</sup> See, e.g., note 11 *supra*; Boyer, *supra* note 79, at 158-59 n.169 (quoting Prof. Harold Green).

<sup>117</sup> See, e.g., T. COOLEY, *supra* note 10, at 116-25. For a discussion of the relation of the nondelegation doctrine to the premises of the traditional model, see pp. 1672-73 *supra*.

<sup>118</sup> E. FREUND, *supra* note 10, at 582-83 (1928). Current advocates of the nondelegation doctrine—most notably Professor Lowi, see note 120 *infra*—have either failed to recognize or failed to acknowledge that Professor Freund long ago anticipated all of their arguments.

<sup>119</sup> E. FREUND, R. FLETCHER, J. DAVIES, C. POUND, J. KURTZ, & C. NAGEL, *THE GROWTH OF AMERICAN ADMINISTRATIVE LAW* 39 (1923).

<sup>120</sup> See T. LOWI, *THE END OF LIBERALISM* 297-98 (1969); Wright, *supra* note 73. Judge Wright believes that the revival of the nondelegation doctrine would be an important step in controlling agency discretion, although he recognizes the difficulty in developing workable criteria to differentiate between permissible and impermissible delegations. *Id.* at 586-87. Other critics, such as Judge Friendly, assert the desirability of more specific legislative directives to agencies, but are quite vague as to how this goal is to be accomplished. Judge Friendly seems to rest on the hope that the legislature can be expected to respond to exhortations by judges, commentators, and the public to give greater direction to policy delegations. See FRIENDLY, *supra* note 28, at 163-75. But in view of the limited legislative capacity or incentive for specific delegation, exhortation appears hardly to be sufficient. At the other extreme, Professor Davis takes the view that it is both unrealistic and unnecessary to expect greater specification of policy from the legislature. See K. DAVIS, *supra* note 25, at 27-51.

<sup>121</sup> *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). See also *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). These two decisions are the only ones in our history where the Supreme Court has struck down an entire statutory delegation as unduly broad.

<sup>122</sup> T. LOWI, *supra* note 120, at 297-98.

While the courts might in some cases more carefully limit broad legislative delegations through statutory construction,<sup>123</sup> any large-scale enforcement of the nondelegation doctrine would clearly be unwise. Detailed legislative specification of policies under contemporary conditions would be neither feasible nor desirable in many cases, and the judges are ill-equipped to distinguish contrary cases.

In many government endeavors it may be impossible in the nature of the subject matter to specify with particularity the course to be followed. This is most obvious when a new field of regulation is undertaken. Administration is an exercise in experiment. If the subject is politically and economically volatile — such as wage and price regulation — constant changes in the basic parameters of the problem may preclude the development of a detailed policy that can consistently be pursued for any length of time.<sup>124</sup> These limitations are likely to be encountered with increasing frequency as the federal government assumes greater responsibility for managing the economy.

In addition, there appear to be serious institutional constraints on Congress' ability to specify regulatory policy in meaningful detail. Legislative majorities typically represent coalitions of interests that must not only compromise among themselves but also with opponents.<sup>125</sup> Individual politicians often find far more to be lost than gained in taking a readily identifiable stand on a controversial issue of social or economic policy.<sup>126</sup> Detailed legislative specification of policy would require intensive and continuous investigation, decision, and revision of specialized and complex issues. Such a task would require resources that Congress has, in most instances, been unable or unwilling to muster.<sup>127</sup> An across-the-board effort to legislate in detail would also require a degree of decentralized responsibility that might further erode an already weak political accountability for congressional decisions.<sup>128</sup> These circumstances tend powerfully to promote broad

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<sup>123</sup> See note 111 *supra*.

<sup>124</sup> See J. DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* 145-50 (1927).

<sup>125</sup> See Stewart, *Foreword: Lawyers and the Legislative Process*, 10 HARV. J. LEGIS. 151, 159-66 (1973).

<sup>126</sup> See *id.* at 164-66; J. Stazny, *Congressional Reform as Strategic Politics* (1975) (on file with the author).

<sup>127</sup> Although the example of taxation shows that Congress is capable of gearing up for detailed legislation (and frequent revision) if there are strong political incentives to do so, such incentives are lacking in many areas.

<sup>128</sup> The same basic criticisms apply to proposals for a greatly strengthened oversight role for Congress. The legislature lacks the resources to discharge such a role. Even if such resources were provided, there would necessarily be an

delegations of authority to administrative agencies.<sup>129</sup> Moreover, quite apart from these factors, one may question whether a legislature is likely in many instances to generate more responsible decisions on questions of policy than agencies.<sup>130</sup>

Finally, there are serious problems in relying upon the judiciary to enforce the nondelegation doctrine. A court may not properly insist on a greater legislative specification of policy than the subject matter admits of. But how is the judge to decide the degree of policy specification that is possible, for example, in wage and price regulation when it is initially undertaken? How does he decide when knowledge has accumulated to the point where additional legislative specification of policy is now possible? What if the political situation is such that the legislative process cannot be made to yield any more detailed policy resolution?<sup>131</sup> How does the judge differentiate such cases from those where the legis-

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effective delegation of authority that would raise troubling questions about the political responsibility of oversight decisions. Indeed, such questions already exist concerning the limited oversight role Congress presently assumes. See Stewart, *supra* note 125, at 159-66. While there are examples of effective and politically responsible congressional oversight, see, e.g., 1 K. DAVIS, *supra* note 2, at 154 (OPA), there are perhaps an equal or greater number of contrary examples, see, e.g., K. DAVIS, *supra* note 25, at 16-17 (Renegotiation Board). And the same basic difficulties attend proposals to strengthen Congress' control over the exercise of administrative discretion that require administrative regulations to be laid before the legislature for approval or disapproval or provide for a veto of agency action by legislative action short of enacting a statute. See authorities discussed in W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW: CASES AND COMMENTS* 122-27 (6th ed. 1974). All of these proposals suffer from the defect of assuming that Congress can responsibly accomplish through other means what it cannot achieve through legislation. See Stewart, *supra* at 169-74.

<sup>129</sup> See J. LANDIS, *supra* note 31, at 51; Fuchs, *Introduction: Administrative Agencies and the Energy Problem*, 47 *IND. L.J.* 606, 608 (1972) (broad delegations avoid potential stalemate by providing a "means of acting without making final choices"). In such circumstances, however, the agency may enjoy no more success than the legislature in imposing sound and consistent policy on a strongly divided field of forces.

<sup>130</sup> That legislative specification of policy is no guarantee of wisdom is indicated by criticism of the detailed provisions of the 1970 Clean Air Amendments. See Jacoby & Steinbruner, *Salvaging the Federal Attempt to Control Auto Pollution*, 21 *PUBLIC POLICY* 1 (1973). Moreover, while administrative agencies have been criticized as unduly responsive to wealth and to organized interests, see T. LOWI, *supra* note 120, at 87-89, such criticisms might equally be applied to the legislature, see Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 *COLUM. L. REV.* 1293, 1306 & n.63 (1972) (instances of "farsighted" agency action blocked by "Congress acting in the service of special interests"); cf. E. FREUND, *supra* note 10, at 221-22 (suggesting that whether the legislature is actually a more responsive or safer repository of regulatory power than administrative agencies must be a matter of pure speculation).

<sup>131</sup> See, e.g., PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, *supra* note 35, at 322, 325.

lature is avoiding its "proper" responsibilities?<sup>132</sup> Such judgments are necessarily quite subjective, and a doctrine that made them determinative of an administrative program's legitimacy could cripple the program by exposing it to continuing threats of invalidation and encouraging the utmost recalcitrance by those opposed to its effectuation. Given such subjective standards, and the controversial character of decisions on whether to invalidate legislative delegations, such decisions will almost inevitably appear partisan, and might often be so.

This is not to deny the possibility of a more modestly conceived judicial role in policing legislative delegation of discretionary choices to agencies. Courts have applied policies of clear statement to construe narrowly statutory delegations that infringe important individual interests.<sup>133</sup> Were policies of clear statement applied in the context of economic and social administration, Congress would at least have to take a fresh look at the agency's mandate before its powers were extended.<sup>134</sup> Accordingly, a policy of narrow construction of statutory delegations might usefully be followed,<sup>135</sup> but adoption of such a policy would hardly represent the large-scale revival of the nondelegation doctrine envisaged by Professor Lowi and Judge Wright. Obtaining greater specificity in regulatory statutes is essentially a political problem,<sup>136</sup> and even if judges were to hazard a more venturesome approach, any remotely tolerable application of the nondelegation doctrine would be limited to gross instances of legislative irresponsibility. As Professor Lowi himself admits,<sup>137</sup> a very substantial residuum of discretion would remain.

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<sup>132</sup> Even where seemingly precise standards are provided, the translation of such standards into operational realities may involve such large measures of discretion that their practical effect in restraining agency choice may be extremely limited. See, e.g., *Yakus v. United States*, 321 U.S. 414 (1944); *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533 (1939).

<sup>133</sup> See pp. 1680-81 *infra*.

<sup>134</sup> Inertia and limitations in resources might preclude meaningful congressional reassessment in every case where agency authority is narrowly construed, but given current criticism of agencies' performances, such a consequence may be beneficial in many, perhaps most, cases.

<sup>135</sup> Unfortunately, courts often do just the opposite, broadly construing administrative powers in cases where the justification for broadened powers is dubious. See sources cited at note 111 *supra*. However, *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336 (1974), gives some indication of judicial willingness to force legislative reconsideration of broad delegating statutes by applying a narrowing construction to them.

<sup>136</sup> G. HENDERSON, *THE FEDERAL TRADE COMMISSION 1-2* (1924).

<sup>137</sup> T. LOWI, *supra* note 120, at 299-303. To deal with this residue of discretion, Professor Lowi would require administrative rulemaking to narrow further agency discretion. See *id.*

### C. Structuring Administrative Discretion

A third possible response to the problems created by broad legislative delegation is to acknowledge the large discretion enjoyed by agencies and to require that it be exercised in accordance with consistently applied general rules. This alternative is responsive to the ideal of formal justice: that government interference with important private interests be permitted only in accordance with rules known in advance and impartially applied. "*La liberté consiste à ne dépendre que des lois.*"<sup>138</sup>

By eliminating ad hoc official discretion, formal justice enables individuals to adjust their own conduct to avoid sanctions<sup>139</sup> or to treat with the government on terms they regard as the most advantageous.<sup>140</sup> Substituting general rules for ad hoc decision also tends to ensure that officials will act on the basis of societal considerations embodied in those rules rather than on their own preferences or prejudices, and increases the likelihood that the contents of the policies applied will be consistent with the preferences of a greater number of citizens.<sup>141</sup> All of these effects taken together promote a general sense of individual and social security.

To the extent that agencies exercise uncontrolled discretion, there is an absence of formal justice.<sup>142</sup> The traditional model of administrative law seeks to promote formal justice by requiring that agency action conform to legislative directives.<sup>143</sup> Where

<sup>138</sup> Voltaire, quoted in F. NEUMANN, *THE DEMOCRATIC AND THE AUTHORITARIAN STATE* 67 n.12 (1957). See also *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 217 (1953) (Black, J., dissenting) (society not free where "one person's liberty" depends "on the arbitrary will of another").

<sup>139</sup> See F. VON HAYEK, *supra* note 115, at 205-09 (1960) ("boast of free men" that compliance with known law precluded "need to ask anybody's permission"); J. DICKINSON, *supra* note 124, at 30-31, 112 (1927); HEWART OF BURRY, *THE NEW DESPOTISM* 151 (1929).

<sup>140</sup> Thus formal justice will, *ceteris paribus*, tend to advance allocational efficiency. B. BARRY, *POLITICAL ARGUMENT* 100-01 (1965).

<sup>141</sup> If governmental action is ad hoc, its rationale may be difficult to detect, let alone criticize. Generality and publicity may have a prophylactic effect on the content of policy. These effects may, however, be limited. In a dictatorship of legalistic racists, formal justice may be of little value, although some would find virtue in making the basis of such a regime explicit.

<sup>142</sup> See J. DICKINSON, *supra* note 124, at 145.

<sup>143</sup> Courts have supplemented the traditional model by imposing modest limits on agencies' discretion which tend to promote formal justice. See pp. 1679-80 *supra*. It should be noted, however, that courts have frequently tolerated serious inconsistencies in agency policy by blandly referring to the agency's need "to make the pragmatic adjustments which may be called for by particular circumstances," *Fuels Research Council, Inc. v. FPC*, 374 F.2d 842, 852 (7th Cir. 1967), quoting *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942); and they have refused to require agencies to develop general policy through rules rather than through

the applicable statutes are vague or ambiguous, or grant broad powers to the agency, however, the protections and sense of formal justice provided by the traditional model may be rendered largely illusory. In response to this problem, Professor Davis has argued that the dangers posed by broad statutes can to a large extent be avoided if courts require agencies themselves to adopt rules that narrow discretion.<sup>144</sup> This proposal seeks to reconcile the need for (as well as the inevitability of)<sup>145</sup> generous delegations of power to the agencies with the desire for predictability and consistency in governmental policies. However, Professor Davis also recognizes that the value of formal justice<sup>146</sup> may frequently be outweighed by the need for flexible and effective administration.<sup>147</sup> Since rules of varying degrees of specificity may impose different levels of restraint on discretion, he asserts that the ultimate objective is "to locate the optimum degree of structuring

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case-by-case adjudication, *see, e.g.*, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290-95 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947); *Citizens Communication Center v. FCC*, 463 F.2d 822, 824 (D.C. Cir. 1972) (*per curiam*).

<sup>144</sup> *See* K. DAVIS, *supra* note 2, § 2.00-5 (1970 Supp.). Judge Wright has espoused a similar program, although he would also have the judges utilize the nondelegation doctrine to cut back on the initial amount of discretion afforded agencies under the controlling statute. Wright, *supra* note 73. A program of structuring agency discretion as an alternative to legislative specification was apparently first advocated in THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, *supra* note 35, at 316, 322, 325, 326.

The Davis program has received judicial endorsement. *See, e.g.*, *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 758-59 (D.D.C. 1971). Other courts have held that due process requires agencies to adopt coherent standards for agency decisions. *See, e.g.*, *Holmes v. New York City Housing Auth.*, 398 F.2d 262, 265 (2d Cir. 1968) (eligibility for public housing); *Hornsby v. Allen*, 326 F.2d 605, 612 (5th Cir. 1964) (grant of liquor licenses).

<sup>145</sup> *See* K. DAVIS, *supra* note 25, at 45-50.

<sup>146</sup> The value of formal justice is to some extent dependent on the individual interest at risk. We insist, for example, on much more strict adherence to formal justice in criminal prosecutions than in public utility rate proceedings, even though the arguments favoring administrative flexibility may conceivably be greater in the former case.

<sup>147</sup> For example, Professor Davis asserts that undue specificity may create loopholes and invite circumvention, *see* K. DAVIS, *supra* note 25, at 15-21, 54, and may not take account of the need for flexibility to deal with particular circumstances. He accordingly concludes that "[e]ven when rules can be written discretion is often better. Rules without discretion cannot fully take into account the need for tailoring results to unique facts and circumstances of particular cases." *Id.* at 17. There is, however, no reason to believe that agencies could not in principle accommodate values of formal justice and the need for individualized decisionmaking by modifying and adapting general rules to fit new circumstances as the common law courts have. *See* Note, *supra* note 44. The real difficulty with attempting to curb discretion through reliance on agency rules is that the resources devoted to developing, maintaining, and using rules for predictive purposes increase considerably as rules become more detailed, and there comes a point where the marginal costs of further elaboration are not justified by the incremental gains in formal justice.

in each respect for each discretionary power."<sup>148</sup> In order to reach this goal, Professor Davis contends that the courts must in each case "determine what discretionary power is necessary and what is unnecessary."<sup>149</sup>

This test might, however, leave a good deal of residual discretion in the very areas where its exercise has occasioned concern. More seriously, it would place an impossible burden on the courts. The difficulties in judicial enforcement of such a standard are closely analogous to those presented by the doctrine against delegation of legislative power that Professor Davis so roundly criticizes. When an agency resists adoption of any rule, or declines to make a vague rule more specific, how is the judge to determine whether its position is justified? The field in question and the state of relevant knowledge may not permit a more specific rule. The political situation may be too mixed or fluid to allow a firm policy to crystallize. Moreover, the formulation of meaningful rules may require a considerable expenditure of agency resources<sup>150</sup> that might be better utilized elsewhere. In light of these considerations, the degree of specificity in a rule must ordinarily be determined by the agency.<sup>151</sup>

Courts may properly seek to promote the purposes of formal justice by demanding more complete articulation of the grounds for agency action, whether accomplished through rulemaking<sup>152</sup> or adjudication,<sup>153</sup> and should police the agencies' choice between rulemaking and adjudication for abuse of discretion.<sup>154</sup> But the notion that judges can and should attempt to "locate the optimum

<sup>148</sup> K. DAVIS, *supra* note 25, at 99 (emphasis omitted).

<sup>149</sup> *Id.* at 50-51 (emphasis omitted).

<sup>150</sup> Important rulemaking proceedings at the FCC have dragged on for years because of changes in broadcast performance, the prevailing political climate, and the identity of the commissioners. For example, eleven years of proceedings were required before the FCC's adoption of its Prime Time Access Regulations. See *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470, 474-75 (2d Cir. 1971). The regulations were almost immediately the subject of fresh proceedings and were modified in 1974. See *In re Consideration of the Operation of, and Possible Changes in, the "Prime Time Access Rule,"* 44 F.C.C.2d 1081 (1974).

<sup>151</sup> It might be argued, however, that the agency should not proceed with enforcement actions unless it has a sufficiently clear idea of what its policy should be to permit its expression in a general rule. But there are occasions when immediate action is justified in order to develop public confidence and support, to establish the agency's credibility with regulated interests, or to develop data on which to make firmer judgments on general policy at a later date. The choice is primarily a political one which should normally be made by the agency.

<sup>152</sup> See, e.g., *Citizens Ass'n of Georgetown, Inc. v. Zoning Comm'n*, 477 F.2d 402 (D.C. Cir. 1973).

<sup>153</sup> See, e.g., *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971).

<sup>154</sup> See *Morton v. Ruiz*, 415 U.S. 199 (1974).



degree of structuring in each respect for each discretionary power" is unrealistic and unwise. Since judges would often lack the facts or experience necessary to ascertain the extent of agency ability to specify policy in greater detail, such a standard would largely turn on subjective judgments, and would pose a debilitating threat to agency programs which could chill needed policy initiatives.

Even if it were possible to constrain agency action by rules so that formal justice would be achieved, the implementation of such a program could not in itself solve the problem of asserted bias in agencies' discretionary policy choices. Formal justice merely dictates the manner in which discretion is exercised, not its substance,<sup>155</sup> and is indifferent to the wisdom, fairness, or efficacy of the policy chosen.<sup>156</sup> But much contemporary criticism of administrative discretion is directed precisely at the content of administrative policy. Concededly, formal justice may indirectly affect policy outcomes. Stiffened requirements of formal justice may weaken agency effectiveness by draining resources and affording opponents new litigating weapons.<sup>157</sup> Requiring agency policy to be crystallized in a rule rather than camouflaged in a series of case-by-case rationalizations<sup>158</sup> may promote more careful decisions and facilitate public and legislative supervision. But the magnitude of these latter effects is subject to question. Many agency opinions still read as exercises in rationalization. Widely scattered, unorganized individuals with a minute stake in agency policy are unlikely to be galvanized into fighting units by a somewhat clearer exposition of those policies. Experience under the National Environmental Policy Act (NEPA) suggests, for example, that the beneficial impact on agency policy of procedural adjustments may be quite marginal.<sup>159</sup> Professor Joseph Sax has gone so far as to assert that:<sup>160</sup>

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<sup>155</sup> Even if the agency is required to act through rules, it still retains its discretion to change the content of those rules, so long as the change is not ad hoc and does not unjustifiably disturb important reliance interests. Note, *supra* note 44.

<sup>156</sup> See J. DICKINSON, *supra* note 124, at 113. Professor Davis candidly asserts that he is concerned with "individual justice" (what is here termed formal justice) to the exclusion of "broad policy making" and "social justice," K. DAVIS, *supra* note 25, at 5-6, but it is precisely in these latter respects that the exercise of administrative discretion is so often criticized today.

<sup>157</sup> See Arnold, *Trial by Combat and the New Deal*, 47 HARV. L. REV. 913 (1934). Obstruction is, however, not a tolerable long-term solution to the problem of agency discretion.

<sup>158</sup> See Bernstein, *The NLRB's Adjudication-Rulemaking Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 597-98 (1971); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

<sup>159</sup> See pp. 1780-81 *supra*.

<sup>160</sup> Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239, 239 (1973).

I know of no solid evidence to support the belief that requiring articulation, detailed findings or reasoned opinions enhances the integrity or propriety of administrative decisions. I think the emphasis on the redemptive quality of procedural reform is about nine parts myth and one part coconut oil.

This is too extreme. A requirement that agencies articulate and consistently pursue policy choices may have only a modest effect on outcomes, but it can serve as a useful, selective judicial tool to force agency reconsideration of questionable decisions and to direct attention to factors that may have been disregarded.<sup>161</sup> A "total" program of "structuring" every facet of agency discretion would not, however, be worth the price. Moreover, while formal justice is valuable for its own sake, it is alone not an adequate solution to the problem of agency discretion.

#### *D. Substantive Rules for Agency Discretion*

The "expertise" rationale for agency discretion is based on the supposition that the administrator's task is to realize a discernible goal — for example, the economic health of a given industry — and that objective rules to achieve the goal can be discovered and implemented. However, the very difficulty that gives rise to the most serious contemporary issues regarding administrative discretion is the absence of agreement on any such single overriding goal. The dominant view is that administrative goals are (or should be) mixed or that, in the absence of any general consensus on a single goal, they must be accepted as mixed. Administration is therefore a process of accommodating various competing social interests.

Despite this problem — indeed, in large part because of it — economic analysis has frequently been advocated as a source of substantive rules for determining administrative policy.<sup>162</sup> Under this theory, the goal of administration is the maximization of the output of goods and services in the economy. This goal is to be implemented through agency rules which mimic, insofar as possible, the allocation of goods and services that would be produced in a perfectly competitive economic market.<sup>163</sup> Since the conditions for allocative optimization are assertedly knowable, agency

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<sup>161</sup> For efforts to assess the impact on policy outcomes of procedural formalities see P. NONET, *ADMINISTRATIVE JUSTICE* (1969).

<sup>162</sup> See, e.g., B. ACKERMAN & S. ACKERMAN, J. SAWYER, D. HENDERSON, *THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY* (1974) [hereinafter cited as ACKERMAN]; W. BAXTER, *PEOPLE OR PENGUINS: THE CASE FOR OPTIMAL POLLUTION* (1974).

<sup>163</sup> See Polinsky, *Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's Economic Analysis of Law*, 87 HARV. L. REV. 1655 (1974).

performance can be measured and controlled by its conformity with the requirements of economic efficiency. Mimicry of the market is, nonetheless, a solution to agency discretion that is procedural in principle since the market itself is a procedural solution to the problem of allocating goods and services. Such a solution has merit in some contexts; however, a requirement that administrators seek to maximize allocational efficiency falls short of providing a complete solution to the problem of agency discretion for a number of reasons.

*First.* — Because applied economics is an art that requires discretionary judgments to be made in selecting the proper universe for analysis, defining and measuring the relevant variables, and resolving the complications of second, third, and fourth order effects generated by possible policy choices,<sup>164</sup> no single policy solution will generally be indicated to be clearly correct.<sup>165</sup> More frequently, there will be respectable economic arguments for a number of quite different alternatives.<sup>166</sup> Even in the case of entry and price regulation in natural monopoly industries, where the market analogue is most readily apparent and applicable, these discretionary elements are many.<sup>167</sup> The indeterminacy becomes far more acute in fields of regulation, such as those relating to environmental quality, that are more remote from market analogues.<sup>168</sup> Therefore, although economic analysis is undoubtedly a powerful and useful tool for assessing administrative policy choices, a rule requiring administrators to select policies which

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<sup>164</sup> See, e.g., ACKERMAN, *supra* note 162, at 9-135.

<sup>165</sup> In response it may be argued that the degree of refinement in the analysis need not be pushed beyond the point where the costs of the analysis threaten to exceed its likely benefits. But such a procedure would underscore the importance of (debatable) simplifying assumptions, and introduces an increased degree of uncertainty and possible error in the results. See, e.g., ACKERMAN, *supra* note 162, at 17-135. However, the problem of complexity may be equally present in any other model for decisionmaking where the model remains that of the single rational decisionmaker.

<sup>166</sup> See Breyer & MacAvoy, *supra* note 83, at 949-52.

<sup>167</sup> See I. A. KAHN, *supra* note 77, at 85-86, 103, 182-99.

<sup>168</sup> See Roberts & Stewart, Book Review, 88 HARV. L. REV. 1644 (1975). For example, to curtail automobile emissions an administrative scheme based solely on considerations of allocational efficiency would have to cope with enormous complexities and uncertainties in measuring the various "costs" of auto pollution in different meteorological conditions, and in devising administratively practicable incentives to secure the "optimal" level of pollution. These difficulties are exacerbated by the uncertain side effects of solutions to the auto pollution problem. For example, the installation of catalysts on the internal combustion engine may result in the emission of hazardous new pollutants, see *EPA Draft Papers Show Health Risk From Catalyst Sulfuric Acid Emissions*, 5 BNA ENVIR. REP. (Current Developments) 1504 (1975), while switching to an electric car would require construction of massive new generating plants.

will secure allocational efficiency will, in practice, leave administrators considerable discretion.

In addition, there may be serious distortions in the process of reducing a wide range of economic and social impacts to the quantifiable terms that are necessary in order to apply the yardstick of allocational efficiency. The very process of quantification may import systematic bias through a tendency to "dwarf soft variables."<sup>169</sup> The values in question — such as environmental and aesthetic amenities or human life and health — may lack market analogues. Surrogate measures for such values are normally tied to "hard" indices that have their own "dwarfing" potential,<sup>170</sup> and may obscure features such as the sense of community in a neighborhood threatened by large-scale development.<sup>171</sup> It may be possible to enrich our methods of analysis to meet these difficulties,<sup>172</sup> but a considerable degree of tunnel vision may be inevitable given the fact that methods of administrative decision must be fitted to the capacities of ordinary men.<sup>173</sup>

*Second.* — Economic analysis normally assumes that choices among alternatives are to be made by reference to the population's existing preferences for goods and services. These preferences are normally assumed to be fixed; however, our present choices among goods and services will affect our future preferences because tastes and values are shaped by experience.<sup>174</sup> Preference-shaping effects are often minimal in private consumption choices, but they may be significant for governmental decisions because of the large absolute amount of resources which may be affected, their

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<sup>169</sup> Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617, 630-31 (1973).

<sup>170</sup> See Roberts & Stewart, *supra* note 166.

<sup>171</sup> Tribe, *supra* note 169, at 625-30.

<sup>172</sup> See, e.g., ACKERMAN, *supra* note 162, 136-46; Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1974).

<sup>173</sup> G. HENDERSON, *supra* note 136, at 328.

<sup>174</sup> Particularly where preferences with a major ideological component are involved, as in the environmental field, rapid changes in preferences may result from dissemination of information and political debate. Roberts & Stewart, *supra* note 166, at 1649. Moreover, to the extent that individuals are given the opportunity to enjoy environmental amenities, they may come to value these amenities more than if they had never been exposed to them. By the same token, poor persons might legitimately contend that those who have never experienced poverty underestimate the importance of industrial development in lieu of enhanced environmental quality. The economic literature on this general problem is sparse. See Rothenberg, *Welfare Comparisons and Changes in Tastes*, 43 AM. ECON. REV. 885 (1953); von Weizsacker, *Notes on Endogenous Change of Tastes*, 3 J. ECON. THEORY 345 (1971); M. Roberts, *How Could the Content of Entertainment Television be Determined: Self-Regulation and the Alternatives* (1974) (copy on file with the author). See generally Tribe, *supra* note 169, at 634-41.

pervasive long-term character, and the fact that the process of choice is collective rather than individual. These characteristics, together with the efforts of affected agency and client interests to maintain and expand programs once initiated, often invest governmental programs with a self-generating, self-fulfilling dynamic.

These dynamic characteristics pose serious problems for proposals that agency policies be selected through economic analysis. Uncertainty is created as to whether the choices should be based on existing preferences or the alternative sets of future preferences that would be generated by other policies that might be chosen. Because policy choice may affect preferences, administrators must at least address the question of whether policy choices should be based on individuals' actual preferences at any given time, or whether such preferences should be discounted, in order to give weight either to the preferences individuals might develop if they were well-informed, or to normative judgments that certain preferences should be encouraged or discouraged.<sup>175</sup>

It is far from obvious that government policies should in principle be addressed solely to "consumers'" existing preferences. Congress in practice — and often in disregard of the advice of proponents of the economic allocation model<sup>176</sup> — frequently adopts policies, such as making transfer payments in kind (food stamps, housing) rather than in cash, that seem implicitly to reject the criterion of maximizing the satisfaction of existing preferences.<sup>177</sup> Whether these policies reflect a conclusion that existing choices will be made in ignorance, or the more "paternalistic" position that the collectivity can dictate the use of transfer pay-

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<sup>175</sup> It might be argued that while governmental policy choices may indeed have an effect on preferences, administrators should disregard such effects in making their decisions. Not only are such effects difficult to gauge, but the very lack of consensus on goals that gives rise to the problem of agency discretion in policy choices and provokes resort to the economic model may mean that administrators will lack any manageable criteria for dealing with such effects. See M. Roberts, *supra* note 174. In these circumstances it may be the better part of valor to mimic the competitive market by defining allocation efficiency in terms of present preferences. However, the problems generated by preference-shaping effects are sufficiently important to deserve thoughtful exploration.

<sup>176</sup> See, e.g., M. FRIEDMAN, *CAPITALISM AND FREEDOM* 178-79, 191-92 (1962).

<sup>177</sup> If the achievement of allocational efficiency by reference to the present preferences of transfer payment recipients were the sole criterion, transfer payments should not be made through, for example, food stamps, because recipients might prefer to utilize equivalent cash payments to obtain commodities other than food. Economic analysis may enable us to approximate the loss in consumer satisfaction, given existing preferences, among those who would rather spend additional income on commodities other than food. However, it cannot tell us whether we should encourage a choice in consumption preferences for food either on grounds of outright paternalism or by way of compensating for imperfect information on the part of consumers.

ments as it sees fit, they suggest that Congress would not regard allocational efficiency as an invariably correct or appropriate principle of policy choice.<sup>178</sup> Moreover, putting congressional judgments to one side, it is hardly self-evident that only existing preferences should "count." Economic analysis cannot ultimately resolve the question of which preferences to encourage or discourage, ignore or implement; but issues of just this sort are at the heart of many governmental choices.<sup>179</sup>

*Third.* — Economic analysis is unable to deal with distributional considerations, both because there is no economic criterion for "correct" wealth distribution and because "there is no objective basis for balancing . . . distributive benefits against allocative costs."<sup>180</sup> Often it is simply assumed that the initial distribution of income is optimal and that any changes in distribution occasioned by the attainment of allocational efficiency will be costlessly corrected by other means, such as transfer payments authorized by the legislature,<sup>181</sup> or that, given a series of administrative decisions, such changes will tend to cancel out.<sup>182</sup>

These assumptions may be highly unrealistic. The initial distribution of income may be far from "optimal," and reform of the tax structure in response to changes in actual distribution or changes in view about fair distribution<sup>183</sup> often comes slowly and

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<sup>178</sup> It might be contended that Congress' rejection of the allocational efficiency principle in the context of particular statutory directives does not preclude administrative adoption of such a principle for the exercise of discretion where directives are unclear. However, it is arguably implicit in broad delegations that agency decisionmaking should be exercised in accordance with general congressional understandings as to factors relevant for such choices, and other statutes may be one reflection of such understandings. See *Marine Space Enclosures, Inc. v. FMC*, 420 F.2d 577, 585-86 (D.C. Cir. 1969) (Even though antitrust statutes do not apply to controversy, FMC must give consideration to "fundamental policies" reflected therein as part of the "public interest" standard that "shapes rules governing . . . regulated industries.").

<sup>179</sup> For example, federal housing and transportation policies since World War II have had a profound effect on the growth of automobile transportation and suburban development, with a resulting effect on preferences and life styles. Had the government instead promoted mass transit and cluster developments, such a living pattern might be preferred by most Americans today.

Of course the impact of particular discretionary choices by administrators is likely to be less sweeping, but the cumulative effect — as, for example, in the environmental area — may be considerable.

<sup>180</sup> Posner, *Taxation by Regulation*, 2 BELL J. ECON. & MGMT. SCI. 22, 44 (1971).

<sup>181</sup> See Polinsky, *supra* note 163, at 1668, 1676-79, which criticizes this assumption.

<sup>182</sup> *Id.* at 1680; see Polinsky, *Probabilistic Compensation Criteria*, 86 Q.J. ECON. 407, 414-18 (1972).

<sup>183</sup> The tax legislative process may also be vulnerable to pressure that casts doubt on the fairness of the distribution that results when the legislature does act.

in gross. It cannot be assumed that changes in the initial distribution resulting from administrative decision will inevitably cancel out or be corrected by legislative action.<sup>184</sup> Quite apart from limitations in congressional resources, a centralized system for redressing the cumulative distributional effects of many individual administrative decisions might prove unworkable because such effects are often interstitial and not easily quantified. In many cases, therefore, administrators must deal with the distributional consequences of agency decisions or no one will.<sup>185</sup>

Moreover, discussion by economists of questions of distributional equity and their relation to allocational efficiency has typically been framed in terms of the aggregate distribution of income; <sup>186</sup> analysis developed in such a global perspective may, however, be of little assistance where distributional effects must be considered in the context of numerous, uncoordinated administrative decisions.<sup>187</sup> The possibility of developing distributional weights that could be utilized in the context of uncoordinated decisions has been explored, but such proposals have serious flaws and the whole concept has been sharply criticized.<sup>188</sup>

Additionally, economists' analyses of distributional issues are

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*See* Surrey, *The Congress and the Tax Lobbyist — How Special Tax Provisions Get Enacted*, 70 HARV. L. REV. 1145 (1961).

<sup>184</sup> It may be that if the effects of allocationally efficient agency policies on the distributions of income are random, each affected individual will gain in the long run. *See* Polinsky, *supra* note 182, at 408-09, 423. The distributive effects of administrative decision may not, however, be random but rather may favor organized interests, particularly regulated and client firms. *See* pp. 1682-87 *infra*. *See also* Kennedy, *supra* note 15, at 383-91 (arguing that uneven distributional outcomes will change the balance of political power and thus render unlikely legislative action to restore the preexisting distribution).

<sup>185</sup> As in the case of preference-shaping effects, however, *see* note 175 *supra*, it might be argued that administrators should simply disregard the distributional effects of their decisions because there are no agreed-upon criteria for evaluating them.

<sup>186</sup> *See* R. POSNER, *ECONOMIC ANALYSIS OF LAW* 212-221 (1972); Thurow, *Toward a Definition of Economic Justice*, 31 THE PUBLIC INTEREST 56 (1973). *See also* J. RAWLS, *supra* note 15. *But see* 1 & 2 A. KAHN, *supra* note 77; Calabresi, *supra* note 102.

<sup>187</sup> The outcome resulting from uncoordinated application of a given decisional rule by a number of independent decisionmakers may be very different from the outcome resulting from centralized application of that rule. For example, if Rawls' "difference" principle, *see* J. RAWLS, *supra* note 15, at 60-83, were applied by each agency solely to its own policies, the aggregate net distributional effect of the decisions of all agencies would not necessarily satisfy the "difference" principle.

<sup>188</sup> A proposal for assigning distributional weights is developed in Weisbrod, *Income Redistribution Effects and Benefit-Cost Analysis*, in *PROBLEMS IN PUBLIC EXPENDITURE ANALYSIS* 177 (S. Chase ed. 1968). For criticism of such proposals, *see* C. Nash, D. Pearce & J. Stanley, *An Evaluation of Cost-Benefit Analysis Criteria*, Harvard Institute of Economics Research Paper (1973).

often of little help in the context of administrative decisions because such analyses are typically framed in terms of distribution among all individuals in society ranked vertically according to net income or wealth,<sup>189</sup> and ignore other distributional axes — horizontal,<sup>190</sup> geographical,<sup>191</sup> or temporal<sup>192</sup> — that have great importance in the administrative context. Moreover, considerations of justice may dictate distribution to each individual of a minimum amount of some specified commodities, such as healthful air or assistance in the defense of criminal litigation.<sup>193</sup> These considerations suggest that the question of distributional equity is far more complex than many economists have allowed, exacerbating the problem of resolving conflicts between allocational efficiency and distributional equity.

The inability of economic analysis to resolve distributional issues is especially pertinent in the case of discretion exercised by agencies whose mission is creating a more equitable distribution of scarce resources, such as public housing. The governing statute may provide little guidance when, as is often the case, the demand for such resources exceeds the supply.<sup>194</sup> It would plainly be contrary to the basic purposes of the public housing program, however, to apply market principles to deal with housing scarcity. No simple alternative principle, such as priority of application, income, number of children, or racial balance is obviously compelling. In these circumstances, economic analysis may provide

<sup>189</sup> See sources cited at note 186 *supra*.

<sup>190</sup> "Horizontal" equity consists in maintaining appropriate conformities among members of the same class and appropriate differences among members of distinct classes. For example, if the price of "old" but not "new" supplies of natural gas is regulated, should "old" consumers enjoy lower prices than "new" consumers? See Breyer & MacAvoy, *supra* note 83, at 984-85.

<sup>191</sup> Geographical equity concerns the distribution of burdens and benefits in different areas of the country. Is it "fair" that New England residents bear most of the brunt of tariff increases designed to reduce importation of fuel oil?

<sup>192</sup> Temporal equity deals with the appropriate weight to be given expectation interests. Even if deregulation of surface transportation is allocationally efficient, should it be adopted if (let us assume) it renders numerous firms unprofitable and causes substantial unemployment?

<sup>193</sup> See Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1973 DUKE L.J. 1153, 1974 DUKE L.J. 527. Distribution of minimum amounts of goods may offer a possible solution to the problem of distribution under decentralized decisionmaking for goods such as education or access to the judicial system, but the nature of other goods — public transportation or wilderness areas — is such that provision of a minimum amount of such commodities to every individual would be impractical or wildly expensive.

<sup>194</sup> For example, see the statutes discussed in *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970).



some assistance in understanding the consequences of alternative choices for housing markets, but it cannot resolve the basic decisional problem.<sup>195</sup>

*Fourth.* — Economic analysis appears unable to accommodate process values.<sup>196</sup> Decision is a function of a centralized decision-maker's measurement of alternative outcomes. No direct participation in the process of decision by those affected is required; indeed, the political tug and pull arising from participation might well threaten the impartiality and rationality of the decisional process. Yet administrative decisionmaking is sharply criticized as remote, impersonal, and unresponsive to the concerns of those affected.<sup>197</sup> Some mechanism for broader participation, direct or representative, may accordingly be desirable in order to enhance the public acceptability of resulting policies and foster that sense of involvement in, and responsibility for, government which is itself a good.<sup>198</sup>

The significance of these limitations in economic analysis will vary considerably from case to case, depending on the nature of the governmental functions involved and the importance of relevant considerations other than allocational efficiency. One might conceive of a spectrum of agency activities arranged in terms of the primacy of allocational efficiency as an appropriate goal of decision. One extreme category would include the regulation of natural monopolies or concentrated oligopolies, where the fundamental goal ought to be allocational efficiency. Market factors or their analogues may be developed as the basis for decision with relative ease<sup>199</sup> and the shaping of consumer preferences and dis-

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<sup>195</sup> It is difficult to conceive how economic analysis might have ameliorated the typical dilemmas presented in *Otero v. New York City Housing Authority*, 484 F.2d 1122 (2d Cir.), *rev'g* 354 F. Supp. 941 (S.D.N.Y. 1973). Other imponderables are presented in proposals to substitute cash payments to the poor for governmental provision of specific commodities such as housing and food. See note 177 *supra*.

<sup>196</sup> See Tribe, *supra* note 169, at 630-33.

<sup>197</sup> See authorities cited at note 435 *infra*.

<sup>198</sup> See generally Tribe, *Policy Science: Analysis or Ideology?*, 2 *PHILOSOPHY & PUB. AFF.* 66, 83 (1972). The achievement of allocational efficiency through the market promotes direct participation by the individual. Such participation is cut off when the government uses its coercive powers to regulate private economic activity, or undertakes to provide goods and services itself. Even when the government collectively provides that distribution of goods and services that would be provided in a perfect, costless market, the loss of participation cannot be gained. In an era of increasing governmental control over all aspects of economic life, this loss, rather than the size or power of the government, may be the root of frustration and an important element in the allure of free exchange ideals, including those of Hayek and Nozick. See generally F. VON HAYEK, *supra* note 115; R. NOZICK, *supra* note 104.

<sup>199</sup> See generally 1 & 2 A. KAHN, *supra* note 77.

tributional factors may be disregarded to the same extent as essentially similar problems in standard competitive markets. To the extent that departures from allocational efficiency are sought — as in the case of air fare cross-subsidies to underwrite service to small towns — one can pinpoint net economic costs and force hard consideration of the justification of, for example, forcing long haul passengers to subsidize such short haul passengers. It is just this sort of exacting scrutiny which is sorely needed in many regulatory contexts.

A middle category would include fields less analogous to private markets — for example, environmental protection or food and drug regulation — where distributional and preference shaping issues have greater importance, the limitations of economic analysis may be more apparent, and the impetus for some process of representation of affected interests more urgent. Economic analysis may, however, be extremely useful in underscoring the relevance of allocational efficiency and the costs of departures from it,<sup>200</sup> and in identifying the least expensive way to achieve given goals.<sup>201</sup>

The other polar category would encompass the distribution of scarce “welfare” resources, such as public housing, in which allocational efficiency is unlikely to play more than a subsidiary role, and a quasi-political process of decision may be more appropriate.

But even if we consider only those administrative decisions where considerations of allocational efficiency should predominate, we are still faced with a problem of implementation. Experience suggests that Congress is unlikely to replace broad agency delegations with a specific command to maximize allocational efficiency. The suggestion that agencies would pursue more economically efficient policies if economists were appointed as commissioners<sup>202</sup> may be somewhat naive when one considers the prevalence of economic experts on both sides of many major regulatory and antitrust controversies, the fact that possession of a professional degree is not a guarantee of excellence, and the importance of other factors in agency decisions. Reliance on reviewing courts to promote greater allocational efficiency in agency policies likewise appears misplaced.<sup>203</sup>

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<sup>200</sup> Thus, on hard examination of the efficiency issues, one may conclude that distributional issues are less compelling than originally thought. See S. Breyer, *Introducing Economic Analysis* (1973) (Memorandum on file with the author).

<sup>201</sup> See ACKERMAN, *supra* note 162, at 223–81.

<sup>202</sup> See Green & Nader, *supra* note 74, at 888.

<sup>203</sup> At least in the context of administrative law, the decisional record, see note 111 *supra*, suggests that judges frequently lack the requisite economic training to develop allocationally efficient policies or are concerned with other values.

Specialized advocacy is a potential, albeit incomplete, answer to these difficulties. The creation of a specialized, high-level government advocate to provide agencies with sound economic analysis in selected cases has been suggested.<sup>204</sup> Such advocacy might be justified as necessary to ensure representation of the diffuse interests of those individuals who would gain from the adoption of allocationally efficient policies. But if allocational efficiency is not accepted as the sole criterion of agency policy, should not other diffuse interests also enjoy representation? The principle of advocacy for the unrepresented is not easily confined, and a system of representation for a broad range of affected interests may be inimical to the adoption of efficient policies.<sup>205</sup>

The principle of allocational efficiency thus displays both theoretical and practical infirmities, and fails to provide an all-embracing solution to problems of agency choice. Even if there is no single generally appropriate principle for agency decisionmaking (and no other single principle can match allocational efficiency in power and generality), it is nonetheless conceivable that a "correct" mix of values and corresponding decisional rules could be identified for each discrete field of government administration. Even if such rules existed, they would not be obvious from the statute or *ex hypothesi* there would be no problem of discretion. In such circumstances, one might doubt the ability of judges to divine such rules or their willingness to enforce them against the agencies. Instead, one would be remitted to faith in the specialized experience of administrators to discover and implement the "correct" rules; but this is the very faith of which we have become disabused.

### III. THE EXPANSION OF THE TRADITIONAL MODEL

With the breakdown of both the "transmission belt" and "expertise" conceptualizations of the administrative process, administrative law theories that treat agencies as mere executors of

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*See, e.g.,* United States v. Topco Associates, 405 U.S. 596, 609 (1972) ("courts are of limited utility in examining difficult economic problems"). *But cf.* Posner, *supra* note 186, at 320-32 (suggesting that common law decisions tend to promote allocational efficiency).

<sup>204</sup> *See* Breyer, *supra* note 200. Professor Breyer's proposal would apparently be limited to the major regulatory agencies and thus would not reach the problem of inefficient policies adopted by promotional and service agencies. A proposed alternative is creation of a policy review board to scrutinize the analysis conducted in support of major policy decisions by federal agencies. *See* ACKERMAN, *supra* note 162, at 147-61. If properly constituted (admittedly a large task), such a board might improve the quality of agency analysis, reduce the incidence of unnecessarily wasteful policies, and assist courts in discharging their reviewing function.

<sup>205</sup> *See* pp. 1804-05 *infra*.

legislative directives are no longer convincing. More recent attempts to impose limits on administrative policy choice through rulemaking or economic theory have accepted as inevitable a large degree of agency discretion arising from the inability of Congress (and, perhaps, of any rule-giver) to fashion precise directives or posit unambiguous goals that will effectively determine concrete cases. These attempts have, however, failed to provide an alternative, generally applicable framework for the control of administrative discretion. Faced with the seemingly intractable problem of agency discretion, courts have changed the focus of judicial review (in the process expanding and transforming traditional procedural devices) so that its dominant purpose is no longer the prevention of unauthorized intrusions on private autonomy, but the assurance of fair representation for all affected interests in the exercise of the legislative power delegated to agencies.

Implicit in this development is the assumption that there is no ascertainable, transcendent "public interest," but only the distinct interests of various individuals and groups in society. Under this assumption, legislation represents no more than compromises struck between competing interest groups.<sup>206</sup> This analysis suggests that if agencies were to function as a forum for all interests affected by agency decisionmaking, bargaining leading to compromises generally acceptable to all might result, thus replicating the process of legislation.<sup>207</sup> Agency decisions made after adequate consideration of all affected interests would have, in microcosm, legitimacy based on the same principle as legislation and therefore the fact that statutes cannot control agency discretion would become largely irrelevant.

The viability in practice of such a pluralist theory of legitimacy is challenged at the outset by the predominant contemporary critique of the administrative process: that agencies are biased in favor of regulated and client groups,<sup>208</sup> and are generally unresponsive to unorganized interests.<sup>209</sup> It is in reaction to this

<sup>206</sup> See, e.g., A. BENTLEY, *THE PROCESS OF GOVERNMENT* (1908); D. TRUMAN, *THE GOVERNMENTAL PROCESS* (1951). In the extreme form of this view, there is no objective, independent yardstick by which one can measure the content of compromise; compromises are legitimated by the process of their negotiation. For criticism of such analysis, see T. LOWI, *supra* note 120; R. WOLFF, *supra* note 81. Pluralist political theory may be regarded as a translation into collective terms of the principle of subjectivity of individual values. See *id.* at 127-31; R. UNGER, *supra* note 33.

<sup>207</sup> However, the policies that would result from legislative-type processes in agencies with specialized functions might be quite different than those that a general-purpose legislature would adopt. See pp. 1792-93, 1795-98, & note 572 *infra*.

<sup>208</sup> See pp. 1684-85 *supra*.

<sup>209</sup> See p. 1686 *supra*.

critique that judges have attempted to transform the traditional model of administrative law to provide a practical way to check such biases. This Article now turns to a critical examination of these efforts.

### A. *The Diagnosis of Imbalance in Representation*

It has become widely accepted, not only by public interest lawyers,<sup>210</sup> but by academic critics,<sup>211</sup> legislators,<sup>212</sup> judges,<sup>213</sup> and even by some agency members,<sup>214</sup> that the comparative overrepresentation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests. Such overrepresentation stems from both the structure of agency decisionmaking and from the difficulties inherent in organizing often diffuse classes of persons with opposing interests.

Under the traditional model, regulated interests stand in a special relationship to the agency decisionmaking process. Generally, only those interest groups subject to agency sanction have been entitled to require initiation of formal proceedings by the agency or to seek judicial review.<sup>215</sup> Accordingly, these groups are ensured a forum in which they can force the agency to respond to their views.<sup>216</sup> The ability to initiate often costly and prolonged formal procedures also gives regulated groups a strong bargaining position in informal agency procedures that is not shared by groups that may participate informally but lack standing to invoke formal procedures.

Regulated interests have a further advantage in all phases of decisionmaking because the information upon which the agency

<sup>210</sup> See, e.g., Lazarus & Onek, *The Regulators and the People*, 57 VA. L. REV. 1069 (1971).

<sup>211</sup> See, e.g., Bonfield, *supra* note 72; Cramton, *supra* note 69; Jaffe, *supra* note 105, at 235.

<sup>212</sup> See note 70 *supra*.

<sup>213</sup> See, e.g., *Moss v. CAB*, 430 F.2d 891, 893 (D.C. Cir. 1970); *Office of Communications of the United Church of Christ v. FCC*, 359 F.2d 994, 1003-04 (D.C. Cir. 1966).

<sup>214</sup> See note 216 *infra*.

<sup>215</sup> See pp. 1717-18, 1723-26, 1752 *infra*.

<sup>216</sup> As former Federal Trade Commissioner Mary Gardner Jones put it:

At the moment under the Commission's law enforcement obligations, it is compelled by due process to listen and take account of the viewpoint of those industries and persons which are subject to its regulations. No such compulsion exists for the Commission to listen and take account of the viewpoints of other members of the public who may be injured by the Commission's failure to act or by ineffective action on its part.

Jones, *Observations by Outgoing FTC Member Mary Gardner Jones on the Outlook for the FTC*, BNA ANTITRUST & TRADE REGULATION REP., No. 636, at D-3 (1973). See also Johnson, *A New Fidelity to the Regulatory Ideal*, 59 GEO. L.J. 869 (1971).

must ultimately base its decision must come to a large degree from the groups being regulated. In theory (and to a large degree in practice) the agency staff can gather information of its own, but agency staff resources are normally limited in comparison to industry resources. Moreover, other parties interested in an agency decision ordinarily have no discovery devices to aid them in developing relevant information and must largely depend on public information supplied by the regulated firms. It is therefore not surprising that there is a tendency for agencies to rely unduly on facts and arguments advanced by regulated firms.<sup>217</sup>

Additionally, the mechanics of bureaucracy may create pressures on administrators to acquiesce in the position of regulated firms. It may be difficult psychologically and organizationally for an agency to operate in an adversary posture over an extended period of time when industry representatives can be helpful to agency personnel if regulated industries are accommodated, but can impose serious resource costs on the agency (through the institution of formal proceedings) if they are not. Furthermore, bureaucracies often seek a routinization of administration which can only be achieved if conflict is avoided;<sup>218</sup> this too will cause agencies to seek compromise with regulated groups.<sup>219</sup>

Even where groups with interests opposing those of the regulated industry have equal access to formal proceedings and information, they may still be at a disadvantage because they cannot become sufficiently organized to have a continuing influence on the substance of agency policy. Unlike the industry representatives of regulated or client companies that have a substantial stake in almost every agency policy and the resources to engage in continuous advocacy before the agency,<sup>220</sup> opposing groups

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<sup>217</sup> See, e.g., Jaffe, *supra* note 77, at 566.

<sup>218</sup> See J. LANDIS, *supra* note 31, at 75.

<sup>219</sup> These tendencies are likely to be accentuated when one turns from regulatory to promotional agencies charged with expanding the output of goods and services in certain sectors of the economy; the community of interest between agencies and organized client interests is obvious. It is, for example, hardly surprising that the Highway Administration should enlist builders and highway engineers as active partners. However, criticism of the Highway Administration as too "pro-highway" may overlook the fact that it is the Congress that gave the agency a mandate to build highways, a mandate which the agency is discharging. Thus the fault, if there be any, may be with the legislature rather than the agency. See Jaffe, *supra* note 77. On the other hand, legislative delegations to promotional agencies rarely command unswerving devotion to the promoted interest, and often indicate that other interests must also be considered in agency policy. To the extent that the agency fails to heed such interests, it is justly subject to criticism. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970).

<sup>220</sup> See J. LANDIS, *supra* note 82; Johnson, *supra* note 216.

are often diffuse and have very small individual stakes in the outcome of any particular agency proceeding. Therefore even though the damage to opposing groups is collectively substantial, the large transactions costs and free-rider effects may be strong deterrents to organization for the purpose of influencing agency decision.<sup>221</sup> While in theory agencies were often created to represent unorganized interests, the realities of administration may often hamper their abilities to do so.<sup>222</sup> In these circumstances, the various unorganized "public" interests are unlikely to be strongly advocated.

In practice, the professional zeal of administrators or judicial or political pressures may frequently check or reverse tendencies toward bias in agency policy.<sup>223</sup> If bias is attributable to imbalance in representation within the agency decisionmaking process, however, a seemingly more reliable antidote would be to provide more effective representation for unorganized "public" interests. If such representation could be provided, policy choices would presumably reflect an appropriate consideration of all affected interests and the pluralist solution to the problem of agency discretion might prove both workable and convincing.<sup>224</sup>

### *B. The Pressures for Expansion of the Traditional Model*

The perceived need for more adequate representation of all persons affected by agency decisions has coincided with a striking expansion of the traditional model's protections to new classes of interests. This process of expansion has been a response to the more general concerns and pressures generated by the growth of government's role in society. Over the past sixty years, administrative regulation of the economy has burgeoned in the face of a growing belief that traditional arrangements of judicially structured private ordering were, in an increasingly urban, technologically developed society, inadequate to protect the interests of important segments of the population and secure essential societal goals. The same conditions have also stimulated the provision by the government of an increased range of goods and services.

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<sup>221</sup> See p. 1686 *supra*.

<sup>222</sup> See, e.g., A. LEISERSON, *ADMINISTRATIVE REGULATION: A STUDY IN INTEREST REPRESENTATION* 8 (1942) ("the administrative cannot deal with an unorganized interest").

<sup>223</sup> See p. 1686 *supra*.

<sup>224</sup> To the extent that agency tendencies to favor regulated or client firms are not due to representational imbalance but to other factors, such as the division of responsibility, or disparity of resources between agencies and such firms, or the existence of shared purposes among them, see pp. 1685-86 *supra*, measures to promote greater equality in representation may be ineffectual. See pp. 1777-81 *infra*.

As a result, administrative authorities have assumed an increasing measure of power over the wealth, income, education, and other advantageous opportunities enjoyed by individuals. In response, the traditional model of administrative law has been extended to control this increased governmental power.<sup>225</sup> This expansion has been to a large degree accomplished through the following doctrinal developments:

- (1) the establishment of an increasingly strong presumption of judicial review of agency action (or inaction);<sup>226</sup>
- (2) the enlargement of the class of interests entitled under the due process clause to an administrative hearing before agency infringement of those interests;<sup>227</sup>
- (3) the enlargement of the class of interests entitled by statute or regulation to participate in formal processes of agency decision;<sup>228</sup>
- (4) the enlargement of the class of interests entitled to obtain judicial review of agency action.<sup>229</sup>

As a result, administrative law is no longer limited to the protection of a small class of private liberty and property interests against unauthorized governmental intrusions, but has assumed far more ambitious responsibilities. During the process of expansion the operation of the traditional model has itself been transformed thereby creating a possible solution to the problem of imbalance in representation in the exercise of agency discretion.

Of these four developments in the transformation of the traditional model of administrative law, the expansion of standing to seek judicial review of agency action and the extension of non-constitutional rights to participate in agency proceedings have been the central elements, and it is with them that the remainder of Part III and Part IV of this Article are principally concerned. However, the extension of due process hearing rights to new classes of interests in private autonomy will be examined in the following subsection by way of prelude to and contrast with the developments of principal concern.<sup>230</sup>

<sup>225</sup> Leading commentators on administrative law have strongly supported these developments. See K. DAVIS, *supra* note 2, at 670-701, 703-27, 941-95 (Supp. 1970); L. JAFFE, *supra* note 2, at 336-53, 459-94, 501-31.

<sup>226</sup> See, e.g., *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971). These decisions demonstrate that relaxations of the ripeness doctrine can be viewed as a part of this development.

<sup>227</sup> See pp. 1717-22 *infra*.

<sup>228</sup> See pp. 1748-55 *infra*.

<sup>229</sup> See pp. 1723-47 *supra*.

<sup>230</sup> The strengthened presumption of reviewability is a principle of such sweep-



*C. The Extension of Due Process Hearing Rights  
to New Interests in Private Autonomy*

In the past forty years a striking expansion of governmental activity has occurred in "service" functions — the provision of goods and services and the administration of transfer payments and insurance schemes — with concomitant increases in government employment. Both the discharge of these functions and the control of officials responsible for their execution involve a degree of governmental power over individual welfare that is, if anything, greater than that involved in governmental regulation of private activity. Although critics have argued that this power over individuals has been exercised in an oppressive and unlawful manner,<sup>231</sup> due process protections have only comparatively recently been extended to protect advantageous relations with the government.<sup>232</sup>

Traditionally, the only interests entitled to constitutional protection against government interference were those that would enjoy protection at common law against invasion by private parties. Thus a government order for an individual to pay money,<sup>233</sup> or to perform certain acts<sup>234</sup> intruded on the domain of "liberty or property" protected by due process because the common law would protect against similar intrusions by private actors.<sup>235</sup> In contrast, the interest in eligibility for a gift, or the opportunity to work for a given employer, or the opportunity to enter into contractual relations with a given firm was not ordinarily subject to common law protection against the donor, employer, or contractor. It was therefore held that no due process safeguards apply to similar advantageous relations with the government. Thus no due process protection traditionally attended

ing application that to examine all its implications would take us far afield; accordingly, it is treated only interstitially in the discussion which follows.

<sup>231</sup> See note 58 *supra*.

<sup>232</sup> There are earlier, scattered instances where the courts afforded such protection. See, e.g., *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117 (1926).

<sup>233</sup> See *Londoner v. Denver*, 210 U.S. 373 (1908).

<sup>234</sup> See *Southern Ry. v. Virginia*, 290 U.S. 190 (1933).

<sup>235</sup> The traditional model's use of a common law analogue to define those interests that enjoyed legal protections against infringement by government officials is illustrated in the context of standing, see pp. 1723-24 *infra*, but it also determined the applicability of due process safeguards. For example, decisions permitting government officials to destroy a person's property under emergency conditions without a prior hearing, see, e.g., *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908), paralleled the privilege of summary destruction accorded private persons by the common law, see W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 625-27 (3d ed. 1964), subject in both cases to subsequent damage liability for the actor if the action was determined to have been unjustified.

the government's denial of noncontractual retirement benefits,<sup>236</sup> or termination of government employment.<sup>237</sup> Such advantageous relations with the government were mere "privileges" or "gratuities," not legally protected rights.<sup>238</sup>

These parallels between private and public law appear ultimately to stem from a contractarian view of the state as an artificial person. An individual enjoys against the state a protected sphere of interests equivalent to that which he enjoys against every other person. This sphere may be infringed with the individual's consent. In the case of intrusions by private individuals one gives consent through contract, and the question whether a given consent authorizes what would otherwise be an unlawful intrusion is decided by judicial procedures. With the government, one's consent is given through a duly constituted elected assembly. Accordingly, when a government official intrudes upon a person's common-law protected interests, that person may require the official to demonstrate that the intrusion is authorized by statute. So long as the protected sphere of individual interests is not infringed, however, the state enjoys as much freedom of action as any other person<sup>239</sup> and need not surmount any procedural hurdles before acting.

But with the expansion of the governmental role, it became less and less tolerable that the government should wield the degree of potentially arbitrary power over the lives of individuals implied by this doctrine. Thus it has now been accepted that due process forbids termination of statutory entitlements, such as welfare payments, without a prior adjudicatory hearing before the agency.<sup>240</sup> Such protections have been extended to other significant advantageous relations with the government, such as tenancy in low income housing,<sup>241</sup> possession of a driver's license,<sup>242</sup> or government employment.<sup>243</sup> Procedural protections have also been afforded as a matter of constitutional right to

<sup>236</sup> *Flemming v. Nestor*, 363 U.S. 603, 611 (1960).

<sup>237</sup> *White v. Berry*, 171 U.S. 366 (1898); *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951). *See also Taylor v. Beckman* (No. 1), 178 U.S. 548 (1900) (elective public office not property for due process purposes).

<sup>238</sup> *Lynch v. United States*, 292 U.S. 571, 577 (1934) (Brandeis, J.).

<sup>239</sup> *See, e.g., Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940); Dicey, *The Development of Administrative Law in England*, 31 L.Q. REV. 148 (1915). *See also J. LANDIS, supra note 31, at 10-16; Fuchs, supra note 86.*

<sup>240</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1970).

<sup>241</sup> *Escalera v. New York City Housing Auth.*, 425 F.2d 853 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970).

<sup>242</sup> *Bell v. Burson*, 402 U.S. 535 (1971).

<sup>243</sup> *Arnett v. Kennedy*, 416 U.S. 134 (1974).

interests, such as those of students,<sup>244</sup> parolees,<sup>245</sup> and prisoners,<sup>246</sup> which the courts had formerly remitted largely to the discretion of quasi-autonomous authorities. At issue today are the limits of the expansion of due process rights to procedural protections at the agency level.

In *Board of Regents v. Roth*,<sup>247</sup> *Perry v. Sindermann*,<sup>248</sup> and *Arnett v. Kennedy*<sup>249</sup> the Supreme Court considered the extent to which due process requires a hearing prior to termination of governmental employment. *Roth* and *Sindermann* established that only "property" or "liberty" interests qualify for due process safeguards, and that "property" must be ascertained by reference to nonconstitutional sources of entitlement such as state or federal statutes or the general law.<sup>250</sup> The "property" standard was broadly construed in *Arnett*, which held that a statute prohibiting discharge of a federal civil servant except for "cause" conferred a "property" interest for purposes of due process, and in *Goss v. Lopez*,<sup>251</sup> where the Court held that a similar "property" interest was conferred on high school students by state laws defining school officials' authority to suspend students.<sup>252</sup>

*Arnett* and *Goss* seem to establish that whenever a person is entitled to challenge official conduct as contrary to statute, he is possessed of a constitutionally protected "property" interest.<sup>253</sup> Put otherwise, *Arnett* and *Goss* seem to indicate that an individual

<sup>244</sup> *Goss v. Lopez*, 95 S. Ct. 729 (1975).

<sup>245</sup> *Morrissey v. Brewer*, 408 U.S. 471 (1972).

<sup>246</sup> *Wolff v. McDonnell*, 418 U.S. 539 (1974).

<sup>247</sup> 408 U.S. 564 (1972).

<sup>248</sup> 408 U.S. 593 (1972).

<sup>249</sup> 416 U.S. 134 (1974).

<sup>250</sup> 408 U.S. at 577 (1972). "Liberty," on the other hand, was found to have a constitutionally defined content, consisting of those governmentally affected advantageous opportunities deemed "essential to the orderly pursuit of happiness by free men," including the right "to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry . . . and bring up children. . . ." *Id.* at 572. In *Roth* a majority held that refusal to renew a teacher's one year employment contract did not involve the "property" or "liberty" interest required to raise due process issues, while in *Sindermann* it was held that refusal to rehire a teacher after ten years' employment might be "property" if the teacher could verify allegations that his discharge violated a de facto tenure system.

<sup>251</sup> 95 S. Ct. 729 (1975).

<sup>252</sup> A majority of the Court found that a "property" interest in continuing in school was conferred by a state statute providing for the public education and compulsory school attendance, even though the same statute provided for suspension without a hearing. *See* 95 S. Ct. at 742.

<sup>253</sup> In *Goss* the Court also found an infringement of constitutionally protected "liberty" in the injury to reputation assertedly caused by a student's suspension, but this "liberty" interest was carefully distinguished from the "property" interest in not being suspended from school when such suspension would contravene the applicable statute and regulations. *See* 95 S. Ct. at 736-37.

has a "property" entitlement to be free of unauthorized governmental action.<sup>254</sup> The only other conceivable reading is that only some limitations on governmental authority confer "property" rights. Neither decision contains language that supports such an interpretation, and criteria for distinguishing those limitations that give rise to "property" rights from those that do not will be difficult to develop.<sup>255</sup>

While the Court may well draw back from the full implications of *Goss* and *Arnett*, the dilution of traditional notions of "property" in the context of procedural due process has far-reaching implications. As developed subsequently,<sup>256</sup> the class of persons with standing to invoke statutory limitations on agency action has been expanded to include the supposed beneficiaries of a regulatory scheme and others indirectly affected by agency action or inaction. Thus the logic of *Arnett* and *Goss* indicates that all beneficiaries and other indirectly affected persons — for example, environmentalists challenging lax enforcement of environmental protection measures — have "property" interests in avoiding unauthorized governmental conduct, raising procedural issues of constitutional dimension whenever they are adversely affected by an agency's asserted violation of a statute. To be sure, possession of such a "property" interest would not automatically entitle a person to a trial type hearing, but merely satisfies the threshold test for deciding whether due process applies at all. Agencies and courts would still have to confront the further issue of what procedures are required by due process in par-

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<sup>254</sup> The traditional model protects this "property" interest by striking down governmental action not authorized by statute. Presumably the traditional model would similarly operate to protect interests in "liberty" (whose content is apparently defined by the Constitution itself, *see* 408 U.S. at 572) to the extent that the definition of "liberty" implies substantive restrictions on governmental conduct. However, "property" interests can be created, defined, and abolished by the legislature (although there may be constitutional limits on the legislature's power to qualify procedures which safeguard such interests, *see* note 255 *infra*). To the extent that "property" interests are involved, therefore, the substantive limits on governmental conduct are set by the popularly elected branch. In the case of "liberty" interests, these limits are ultimately defined by the judiciary, often without clear guidance from the constitutional text. *See* *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>255</sup> Another teasing question left open by *Arnett* and *Goss* is the extent to which the government can escape due process procedural requirements by qualifying the "substantive" right afforded by concurrent limitations on the procedures for its vindication. In both *Arnett* and *Goss* it was held that the procedures should be viewed as logically distinct from the "substantive" right afforded and tested by due process criteria. *But see* *Arnett v. Kennedy*, 416 U.S. 134, 148-52 (1974) (Rehnquist, J.); *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 83-90 (1974).

<sup>256</sup> *See* pp. 1725-30 *infra*.

ticular cases.<sup>257</sup> However, the broadened *Arnett* and *Goss* notion of "property" might in theory lead to a due process requirement that a wide variety of affected interests be afforded opportunities to participate in formal agency procedures for the formulation and implementation of policies affecting those interests. In practice this is unlikely, but logically it seems a very short step from those decisions to the conclusion that the Constitution requires a system of administrative interest representation.

Such a possible extension of due process procedural rights has not been a live issue because judges have thus far found adequate nonconstitutional tools for fashioning a system for representation of various affected interests in formal proceedings before federal regulatory and promotional agencies.<sup>258</sup> In cases where due process safeguards have been imposed the controversy has generally been bipolar in form: a single individual demanding that adjudicatory procedures be afforded before a government agency imposes a sanction or withdraws an advantageous opportunity.

In bipolar controversies, it is still possible to conceive of administrative law as mediating claims of private autonomy and governmental authority. While traditional notions of autonomy would not encompass a person's demands for assistance payments or for continued employment from the government, proponents of the "due process revolution" have assumed that the transition from the right to be let alone to the right to maintain certain basic advantageous relations with government can be accomplished without undue strain on the logic or operation of the traditional model.<sup>259</sup> The objective is still the maintenance of some sphere of private advantage by prohibiting unauthorized governmental conduct. The mechanics of forbidding a government official from withdrawing an entitlement seem little different in form from forbidding the imposition of an unauthorized tax, since the controversy is on-off in form and seems to fit within the familiar paradigm of adjudication.<sup>260</sup>

Such appearances may, however, be misleading, particularly when the procedural protections afforded concern, as they frequently do, governmental advantages that are limited in com-

<sup>257</sup> See generally Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975).

<sup>258</sup> See pp. 1748-53 *infra*. But cf. note 268 *infra*, discussing *National Welfare Rights Org. v. Finch*, 429 F.2d 725 (D.C. Cir. 1970).

<sup>259</sup> See, e.g., Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1251-57 (1965); Reich, *The New Property*, 73 YALE L.J. 733, 771-74, 778-79, 783-87 (1964).

<sup>260</sup> See Fuller, *Adjudication and the Rule of Law*, 1960 PROCEEDINGS, AM. SOC'Y INT'L L. 1 (1960).

parison to the demand for them — public housing, government employment, educational scholarships. For in such cases distributional decisions lurk right under the surface of formally bipolar procedural issues. If trial-type procedural requirements make it difficult to evict existing tenants in public housing,<sup>261</sup> or terminate assistance payments to present recipients,<sup>262</sup> it may be more difficult for new applicants to obtain such benefits. Moreover, the right to invoke procedural protections will give recipients of governmental benefits a degree of bargaining leverage over decisions of agency policy,<sup>263</sup> a consideration which suggests that the extension of due process safeguards to termination of welfare assistance payments,<sup>264</sup> or prison discipline,<sup>265</sup> or suspensions from school of student demonstrators,<sup>266</sup> may be grounded as much in a perceived need to impose a counterweight to bias in administrative policies as in a concern to promote more accurate fact finding in individual cases.<sup>267</sup>

Thus the expansion of due process safeguards, while typically generating bipolar forms of decision, may be responsive to some of the same concerns with the content of agency policies that, as we shall see, underlie the transformation of the traditional model into a multi-polar model of interest representation. In addition, the dilution of traditional concepts of legally protected interests, such as "property," that has attended the expansion of due process safeguards may be related to the dilution of analogous concepts of standing to seek judicial review. While nominally separate developments, they have common roots in the decline of legal formalism based on a close-knit structure of discrete rights, and counterpart official duties, and in the struggle to adapt legal controls to expanded governmental authority. The logic in both developments seems to point to an interest representation model, although such a model is more clearly emerging through the extension of nonconstitutional doctrines of standing and intervention.<sup>268</sup>

<sup>261</sup> *Escalera v. New York City Housing Auth.*, 425 F.2d 853 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970).

<sup>262</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1970).

<sup>263</sup> See pp. 1770-71 & note 483 *infra*.

<sup>264</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1970).

<sup>265</sup> *Wolf v. McDonnell*, 418 U.S. 539 (1974).

<sup>266</sup> *Goss v. Lopez*, 95 S. Ct. 729 (1975); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

<sup>267</sup> An agency's perceived policy orientation may thus be relevant to the procedural protections afforded. See *Richardson v. Perales*, 402 U.S. 389 (1971) (refusing to extend the full panoply of *Goldberg* procedural requirements to the termination of disability benefit payments by the Social Security Administration, regarded as a more reliable or neutral agency than state and local welfare agencies).

<sup>268</sup> In *National Welfare Rights Org. v. Finch*, 429 F.2d 725, 734 n.33 (D.C.

*D. Developing a Model of Interest Representation —  
The Expansion of Standing*

The transformation of the traditional model into a model of interest representation has in large degree been achieved through an expansion of the class of interests entitled to seek judicial review of agency action. This growth has coincided with, and perhaps been shaped by, the expansion of the concepts of liberty and property that has been a response to large-scale government. As a result of this reconceptualization, the number of persons with a legally protected stake in any agency decision has multiplied, and standing has been liberally granted to allow judicial enforcement of the requirement that agencies consider all such affected interests.

1. *Standing Under the Traditional Model.*— The traditional test of standing in the federal courts was, at the beginning of the century, whether the interest asserted by the plaintiff amounted to a "legal right," entitled to the protection of the common law.<sup>269</sup> Thus in *ICC v. Diffenbaugh*,<sup>270</sup> grain elevator dealers were held to have standing to seek review of a Commission order forbidding the railroads to carry out certain contracts with the dealers, whereas in *Edward Hines Yellow Pine Trustees v. United States*<sup>271</sup> and *Alexander Sprunt & Sons, Inc. v. United States*,<sup>272</sup> firms enjoying competitive advantages under railroad rate structures were held not to have standing to complain of ICC orders altering rates in a way that eliminated those advantages. In the former case, plaintiffs enjoyed a contract right protectable at common law against interference by third persons, whereas the latter cases involved commercial relations not enjoying such protections.<sup>273</sup>

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Cir. 1970), the court acknowledged, but did not reach, a due process claim by welfare recipients to participate in proceedings between HEW and state agencies considering termination of federal assistance funds. For suggestions of constitutional underpinnings for a broad right of affected groups to participate in the formulation of agency policy, see Gellhorn, *supra* note 66, at 380 n.87 (1972); Comment, *The Role of the Judiciary in the Confrontation with the Problems of Environmental Quality*, 17 U.C.L.A. L. REV. 1070, 1080 (1970).

<sup>269</sup> See L. JAFFE, *supra* note 2, at 505-13.

<sup>270</sup> 222 U.S. 42 (1911).

<sup>271</sup> 263 U.S. 143 (1923).

<sup>272</sup> 281 U.S. 249 (1930).

<sup>273</sup> Note that in this context the "legal right" test does not involve the circularity with which it is often charged, see, e.g., 3 K. DAVIS, *supra* note 2, at 217, *vis.*, that the question whether a person has a "legal right" turns on whether he can prevail on the merits. One may have a "legal right" in the sense that the interest is protected against invasion by private persons under the common law, and yet the legislature may have validly authorized a government official to invade that right. However, there may be difficulties in analogizing from common

This limitation on standing was consistent with the two central tenets of the then prevailing theory of individual rights against the government: first, that the only valid basis for government intrusion into private autonomy under a contractarian model of the state was the consent of the governed (as expressed through valid legislation); and second, that the common law of property and contract defined the sphere of private autonomy protected against both individuals and the state.<sup>274</sup> It was the province of the judiciary to ensure that the government did not overreach the authority it derived from consent. Accordingly, when the government invaded interests protected under the common law, the person affected had standing to demand that the government establish in court that the invasion was consented to through legislative authorization.<sup>275</sup> Under this theory, standing gave a basis for judicial review coterminous with the individual's due process rights to adequate procedural safeguards since government interference with a common law liberty or property right was also an interference with liberty or property under the fifth and fourteenth amendments.<sup>276</sup>

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law rules developed in the context of private litigation to controversies in which one of the parties is a government agency. See Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claims for Relief*, 83 YALE L.J. 425, 443-50 & n.102 (1974) (discussing *Edward Hines and Sprunt*).

<sup>274</sup>

In other words, unless the citizen first shows that, if the defendant were a private person having no official status, the particular defendant's conduct or threatened conduct would give rise to a cause of action against him by that particular citizen, the court cannot consider whether the defendant officer's conduct is or is not authorized by statute; for the statute comes into the case, if at all, only by way of a defense or of justification for acts of the defendant which would be unlawful as against the plaintiff unless the defendant had official authority, conferred upon him by the statute, to do those acts.

*Associated Industries v. Ickes*, 134 F.2d 694, 700 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943) (footnotes omitted). See also B. WYMAN, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS* 9-15 (1903).

Undue emphasis on the functional or instrumental aspects of the standing doctrine may be misplaced. Restrictive notions of standing have operated to ration scarce court resources and to afford a means of avoiding decisions better left to other processes of resolution, see Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973), but the hold of a formalist conceptual universe on the judicial mind is probably the most important explanation for traditional standing doctrine—the end of the law is simply conceived to be the protection of certain widely recognized private interests.

<sup>275</sup> See *Associated Industries v. Ickes*, 134 F.2d 694, 700 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943), *quoted at note 274 supra*. On the other hand, where the interest in question would not have been protected at common law from intrusions by private individuals, no standing was afforded to complain of its invasion by government officials. See *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940).

<sup>276</sup> See, e.g., *Lochner v. New York*, 198 U.S. 45, 53-54 (1905) ("general right to make a contract in relation to . . . business is part of the liberty of the individual protected by the Fourteenth Amendment").

Congress would presumably enjoy a greater discretion in curtailing standing



The growth of governmental activity has made the yardstick of common law liberty and property rights an inadequate measure of the private interests entitled to seek judicial intervention against asserted administrative illegality. The perceived need to protect new classes of private interests — particularly those in advantageous relationships with the government — has produced a responsive expansion of standing rights.<sup>277</sup>

2. *Diluting the Legally Protected Interest Test.* — One way in which standing has been extended is by broadening the notion of legal right to include interests protected by statute as well as the common law. This expansion (which has parallels in the extension of tort remedies)<sup>278</sup> is sometimes explicitly mandated by the legislature. The Communications Act, for example, provides for judicial review at the behest of a disappointed applicant for a license from the FCC.<sup>279</sup> Even in the absence of such provisions, the courts have sometimes discerned in a statute a legislative intent to afford protection to certain new classes of interests and have afforded a correlative right of judicial review to enforce those protections.<sup>280</sup> The development of the statutory beneficiary concept was at first hesitant.<sup>281</sup> For example, courts were

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rights than in modifying procedural guarantees with a constitutional underpinning. But while the entire question of a constitutional right to judicial review is unresolved and obscure, compare 4 K. DAVIS, *supra* note 2, at 93-107 with L. JAFFE, *supra* note 2, at 381-94, there may well be constitutional limits to Congress' right to foreclose judicial review to certain classes of litigants. See *Crowell v. Benson*, 285 U.S. 22 (1932).

<sup>277</sup> Although the courts' increased liberality in granting standing has not altered the traditional model's basic rationale of protecting private interests, see note 361 *infra*, expanded standing could also be appropriate in a system whose central concern was not the protection of private interests but vindicating a community-wide "public interest that authorities act according to law," in which case it would be logical to extend standing to persons who could not satisfy the traditional "legal interest" test. S. GALEOTTI, *THE JUDICIAL CONTROL OF PUBLIC AUTHORITIES IN ENGLAND AND IN ITALY* 14 (1954); L. JAFFE, *supra* note 2, at 462-500.

<sup>278</sup> See, e.g., *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

<sup>279</sup> Communications Act § 402(b)(1), 47 U.S.C. § 402(b)(1) (1970).

<sup>280</sup> See, e.g., *The Chicago Junction Case*, 264 U.S. 258 (1924) (railroads given standing to seek review of ICC order allegedly giving competitor an undue advantage because Interstate Commerce Act impliedly protects competitors' interests in "equality of treatment").

<sup>281</sup> Professor Albert suggests that past judicial reluctance to apply the notion of statutorily protected interest liberally may reflect a bewitchment with common law reasoning and a consequent reluctance to grant standing where none could be obtained under the old "legal right" test. Albert, *Standing to Challenge Administrative Actions: An Inadequate Surrogate for Claims for Relief*, 83 *YALE L.J.* 425, 451 n.105 (1974). Courts may have supposed, however, that the agencies would adequately protect indirectly affected interests, see note 284 *infra*, and that granting standing too freely might tax agency resources and provide further license for hostile judges to thwart agency programs. See, e.g., *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940); *Tennessee Electric Power Co. v. T.V.A.*, 306 U.S. 118 (1938).

willing to extend standing to competitors in a regulated sector where the prevention of destructive competition was a major purpose of the administrative scheme,<sup>282</sup> but broader classes of putative beneficiaries, such as consumers, were frequently denied standing in the absence of an express statutory warrant,<sup>283</sup> no doubt on the supposition that their interests would be adequately protected by the agency.<sup>284</sup>

In the past decade the statutorily protected interest rationale for standing has been utilized with increasing frequency and boldness even in the case of statutes that are entirely silent on the right to judicial review.<sup>285</sup> Presumptively, any class of interests

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Indeed, the history of the proceedings in *Perkins, supra*, illustrates the very dangers of excessive judicial intervention that probably led the Court to take a narrow view of the statutorily protected interest rationale for standing. See 370 U.S. at 130-32.

<sup>282</sup> E.g., *Alton R.R. v. United States*, 315 U.S. 15 (1942) (railroads have standing to challenge motor carrier competition authorized by ICC). Although standing under the statutorily protected interest rationale was not granted to competitors in the absence of a discernible intent to moderate competition, see *FCC v. Sanders Bros. Radio Stn.*, 309 U.S. 470 (1940), courts frequently construed statutes as protecting competitors. See, e.g., *National Coal Ass'n v. FPC*, 191 F.2d 462 (D.C. Cir. 1951); *L. JAFFE, supra* note 2, at 517-20. See also *Pittsburgh v. FPC*, 237 F.2d 741 (D.C. Cir. 1956).

<sup>283</sup> E.g., *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 266 (1940); *Johnson v. Chesapeake & O. Ry.*, 188 F.2d 458 (5th Cir. 1951). But see the decisions discussed in Office of Communication of the United Church of Christ v. FCC, 359 F.2d 944, 1002 (D.C. Cir. 1966).

<sup>284</sup> See p. 1682 *supra*. If the agency is regarded as representing the interests of the beneficiaries of a regulatory scheme, entrusting the vindication of such interests to private litigants could be viewed as infringing responsibilities which the legislature vested in the agencies. See *L. Singer & Sons v. Union Pac. R.R.*, 311 U.S. 295 (1940); *City of New York v. New York Tel. Co.*, 261 U.S. 312, 316 (1923) (city, as representative of telephone subscribers, not permitted to intervene on side of state agency to defend telephone rates ordered by agency). Concurring in *Singer*, Mr. Justice Frankfurter prophetically observed that to grant standing in such a case "would put upon the district courts the task of drawing fine lines in determining when a private claim is so special that it may be set apart from the general public interest and give the claimant power to litigate a public controversy." 311 U.S. at 307.

<sup>285</sup> Professor Scott believes that standing under the statutorily protected interest rationale ought to be granted far more liberally in cases where Congress has explicitly provided for judicial review than in cases where it has not. See *Scott, supra* note 274, at 648-58. See also *Albert, supra* note 281, at 451 n.104. But this argument is overdrawn. Since *Chicago Junction*, courts have frequently afforded standing to plaintiffs where there was no provision for statutory review at their behest, see, e.g., *Stark v. Wickard*, 321 U.S. 288 (1944), and even in the face of limited statutory review provisions pointedly excluding the litigant seeking review, see *National Welfare Rights Org. v. Finch*, 429 F.2d 725 (D.C. Cir. 1970). But see *Arizona Dep't of Pub. Welfare v. HEW*, 449 F.2d 456 (9th Cir. 1971), *cert. denied*, 405 U.S. 919 (1972).

Logic does not support a sharp distinction between cases of statutory and

which the administrator is required by statute (either implicitly or explicitly) to consider in framing agency policy is entitled to standing.<sup>286</sup> Judicial review has been afforded to individuals who

non-statutory review. Professor Scott argues that a broad standing test is appropriate in statutory review cases because "[C]ongress has weighed the need for and value of judicial review of a given category of administrative decisions, and has decided it is warranted." Scott, *supra* at 656. The current strong presumption in favor of reviewability, however, greatly depreciates the significance of Congress' failure explicitly to provide for judicial review. See, e.g., *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). Perhaps a generously phrased statutory review provision may lead the courts to tilt close standing issues in favor of plaintiff, compare *Hollis v. Kutz*, 255 U.S. 452 (1921), and *United States v. Public Util. Comm'n*, 151 F.2d 609 (D.C. Cir. 1945), with *Rasmussen v. United States*, 421 F.2d 776 (8th Cir. 1970), but to go further in differentiating the two classes of cases is unwarranted.

In construing § 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702 (1970), providing standing for "person[s] suffering legal wrong . . . or adversely affected or aggrieved by agency action within the meaning of a relevant statute . . .," Professors Scott and Albert interpret "legal wrong" as referring to standing based on interests protected at common law, and the "adversely affected or aggrieved" portion as referring to standing explicitly provided by statute. See Albert, *supra* note 281, at 451; Scott, *supra*, at 658. But this construction is unduly restrictive because it seems to preclude standing for statutorily protected interests where judicial review is not explicitly afforded by statute. On the other hand, the broad "zone of interests" standard adopted in *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970), is too expansive a reading of § 702.

The "legal wrong" test contained in § 702 should be read as referring to both interests protected at common law and those protected by statute. "Adversely affected" under § 702 refers to statutory review proceedings which can encompass both those who suffer legal wrong and "surrogate" plaintiffs who do not. See pp. 1730-34 *infra*. So construed, the two parts of the statute overlap, in that both include statutorily protected interests that fall within statutory review proceedings, but this is commonplace in statutory construction. Such a construction permits standing for all legally protected interests (unless precluded by statute) but bars review for interests not legally protected without congressional warrant.

<sup>286</sup> See, e.g., *Davis v. Romney*, 490 F.2d 1360 (3d Cir. 1974) (purchasers of FHA-insured homes challenging FHA failure to require compliance with local housing codes); *Bradley v. Weinberger*, 483 F.2d 410 (1st Cir. 1973) (standing of patients receiving and doctor using drug to challenge assertedly too stringent labeling requirements); *Federation of Homemakers v. Butz*, 466 F.2d 462 (D.C. Cir. 1972) (consumer standing to challenge adequacy of meat labelling); *City of Inglewood v. City of Los Angeles*, 451 F.2d 948 (9th Cir. 1972) (residents in adjacent city affected by noise from airplanes utilizing federally financed airport); *Peoples v. Dep't of Agriculture*, 427 F.2d 561 (D.C. Cir. 1970) (poor people even if not "primary beneficiaries" may challenge operation of Food Stamp program); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968) (persons displaced by urban renewal); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) (spokesmen for "aesthetic, conservation, and recreation" interests to be affected by proposed power project); *Eastern Ky. Welfare Rights Org. v. Shultz*, 370 F. Supp. 325 (D.C. Cir. 1973) (poor may challenge IRS failure to require hospital to care for indigent as condition of charitable status); *Schlafly v. Volpe*, 495 F.2d 273 (7th Cir. 1974) (an extreme example — plaintiffs granted standing to complain of cessa-

are members of a large, unorganized class of diffuse interests — such as those of consumers or environmentalists — even though the individual's material stake in agency policy was comparatively minute.<sup>287</sup>

The extension of standing to an increased range of affected interests is a judicial reaction to the agencies' perceived failure to represent such interests fairly, and the consequent perceived need for court review to correct the dereliction. This concern is made explicit in two decisions, *Scenic Hudson Preservation Conference v. FPC*<sup>288</sup> and *Office of Communication of the United Church of Christ v. FCC*,<sup>289</sup> that are landmarks in the current expansion of standing rights.

In *Scenic Hudson* non-profit conservationist organizations and local towns had been permitted by the Federal Power Commission to participate in a proceeding to license a pumped storage generating plant on the Hudson River. These parties opposed the project and sought judicial review of the Commission's order approving it. They were held to have standing under a statute which afforded review to any party to a Commission proceeding who was "aggrieved" by an order issued therein, and which also required the Commission to approve a project if it was "best adapted to a comprehensive plan for [the benefit of commerce or water power development] and for other beneficial public uses, including recreational purposes." The Court asserted that "recreational purposes" undoubtedly "encompasses the conservation of natural resources, the maintenance of natural beauty, and the preservation of historic sites," and that the organizations and towns should be afforded standing to ensure protection of such interests<sup>290</sup> as an integral part of the "public interest."<sup>291</sup>

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tion of highway construction funded by the federal excise tax on gasoline, on the ground that they paid gasoline taxes and would benefit from utilization of the highways); *Berends v. Butz*, 357 F. Supp. 143 (D. Minn. 1973). However, a few decisions continue to deny standing to beneficiaries of administrative schemes on the ground that their interests should be represented by agencies or other political units. See, e.g., *Stanton v. Ash*, 384 F. Supp. 625 (S.D. Ind. 1974) (highway user lacks standing to complain of highway fund impoundment because injury too generalized and State of Indiana proper representative).

<sup>287</sup> See, e.g., *United States v. SCRAP*, 412 U.S. 669 (1973); *Joseph v. FCC*, 404 F.2d 207 (D.C. Cir. 1968) (single viewer challenge to license renewal). This generous attitude towards standing contrasts ironically with the Court's unsympathetic attitude towards the class action, see *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), as an analogous device for securing the representation of widespread classes of interests in quasi-regulatory matters. See generally Note, *The Cost-Internalization Case for Class Actions*, 21 STAN. L. REV. 383 (1969).

<sup>288</sup> 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).

<sup>289</sup> 359 F.2d 994 (D.C. Cir. 1966).

<sup>290</sup> As an alternative ground for decision, the court found that certain of the

The failure of regulatory agencies to protect interests other than those of regulated firms was given sharper emphasis in *Church of Christ*. The FCC's "temporary" renewal of a television license was challenged by two local viewers, a local church, and a national church organization, all of whom charged the station with racial discrimination in programming. The Commission had denied these challengers the right to intervene in the agency proceedings and had also declined to order an evidentiary hearing on the charges.<sup>292</sup> Treating the questions of intervention and standing as one,<sup>292</sup> the court held that "responsible representatives" of television viewers were entitled to participate in the Commission's decisional procedures and challenge its decisions in court. This holding was explicitly based on the inability of the Commission alone to represent the interests of viewers adequately, because of limitations in agency resources.<sup>293</sup> The Court also suggested that the Commission was inclined to be unduly deferential to broadcaster interests:<sup>294</sup>

We cannot fail to note that the long history of complaints against WLBT beginning in 1955 had left the Commission virtually unmoved in the subsequent renewal proceedings, and it seems not unlikely that the 1964 renewal applications might well have been routinely granted except for the determined and sustained efforts of Appellants . . . .

Conceding that the Commission is "directed by Congress to protect the public interest" and "is the prime arbiter of the public interest," the court nonetheless concluded that:<sup>295</sup>

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petitioners had established sufficient economic injury to support standing. See 354 F.2d at 616.

<sup>291</sup> The court then held that the Commission had failed to consider adequately an alternative proposal suggested by one of the petitioners. On remand, the Commission approved a modified version of the project, and its decision was upheld by a divided court. *Scenic Hudson Preservation Conf. v. FPC*, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972). See also pp. 1780-84 *infra*, discussing the subsequent history of *Scenic Hudson*.

<sup>292</sup> See 359 F.2d at 1000 n.8. The governing statute provided that any "party in interest" may file a petition to deny a license and participate in hearings therein, Federal Communications Act §§ 309(d), (e), 47 U.S.C. §§ 309(d), (e) (1970), and that judicial review might be sought by any "person who is aggrieved or whose interests are adversely affected" by the Commission's grant of a license renewal application, Federal Communications Act § 402(b)(6), 47 U.S.C. § 402(b)(6) (1970). In reaching its conclusions, however, the court did not rely to any significant extent on analysis of this statutory language.

<sup>293</sup> 359 F.2d at 1003. Unlike *Church of Christ*, the few previous decisions providing standing rights to the beneficiaries of regulatory schemes which the court cited, see 359 F.2d at 1002, were not specifically based on the inadequacy of the agency's representation of such indirectly affected interests.

<sup>294</sup> 359 F.2d at 1004.

<sup>295</sup> 359 F.2d at 1003-04.

The theory that the Commission can always effectively represent the listener interests in a renewal proceeding . . . is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption . . . neither we nor the Commission can continue to rely on it.

Accordingly, the Court held that "responsible and representative groups" asserting such interests could obtain judicial review of agency decisions, and that the Commission was required to permit "one or more" of the appellants to intervene in its proceedings.<sup>296</sup>

The holdings in *Scenic Hudson* and *Church of Christ* might be limited by the letter of the relevant statutes, but their governing spirit clearly reflects a general concern with the inability of agencies to provide adequate protection to interests other than those of regulated firms. That broad concern has been reflected in many subsequent decisions which utilize the statutorily protected interest rationale to afford standing to a wide variety of affected interests.<sup>297</sup>

3. *Surrogate Standing*.—Expansion of the statutorily protected interest rationale for standing may not, in itself, be sufficient to ensure that statutory beneficiaries will be represented in agency or judicial review proceedings. When an injury to a statutorily protected interest is diffused so that no individual suffers any great injury, group representation may be difficult to organize and no single individual may have an incentive to undertake a costly challenge of agency action. Recognizing this problem, courts have occasionally afforded judicial review to persons with sufficient economic injury to provide an incentive to challenge agency action even when no interest of their own is protected by statute or common law.

In the landmark *Sanders Brothers Radio Station*<sup>298</sup> case, the Supreme Court held that an existing broadcaster had standing to challenge a license grant to a potential rival where the governing statute granted judicial review to persons "aggrieved or whose interests are adversely affected by any decision by the Commission granting or refusing [a license application]."<sup>299</sup> Standing was afforded the existing broadcaster not because its own interest in freedom from competition enjoyed statutory protection (a plausible interpretation expressly rejected by the Court),<sup>300</sup> but

<sup>296</sup> The subsequent history of *Church of Christ* is discussed at p. 1758 *infra*.

<sup>297</sup> See, e.g., cases cited at note 286 *supra*.

<sup>298</sup> *FCC v. Sanders Bros. Radio Stn.*, 309 U.S. 470 (1940).

<sup>299</sup> *Id.* at 476-77.

<sup>300</sup> *Id.* at 473-76.

to vindicate the interests of the "public" — predominantly listeners — in agency compliance with the requirements of the Communications Act.<sup>301</sup> Thus *Sanders* construes statutory review provisions as affording standing to plaintiffs who have no legally protected interest so that they may act as surrogates<sup>302</sup> for those who do.

In *Association of Data Processing Service Organizations v. Camp*,<sup>303</sup> the Supreme Court apparently extended the principle of surrogate standing to a case where the governing statute, unlike that in *Sanders*, did not contain explicit judicial review provisions that might be construed as authorizing such standing. *Data Processing* interpreted the APA as affording standing to persons who suffer "injury in fact" by reason of the challenged agency action, and who are also "arguably within the zone of interests to be protected or regulated" under a relevant statute.<sup>304</sup> The opaque "zone of interests" test is not only difficult to apply,<sup>305</sup> but its very vagueness also encourages courts to skirt the question of whether standing is afforded the plaintiff in order to protect his own statutorily-protected interests or as a surrogate to protect the interests of others.<sup>306</sup> The distinction may be significant in

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<sup>301</sup> *Id.* at 476-77. By contrast, those whose interests were protected by the statute, namely listeners, might not have organization or incentive to challenge the agency's action. See, e.g., *Associated Indus. v. Ickes*, 134 F.2d 694 (2d Cir. 1943), vacated as moot, 320 U.S. 707 (1943). The fear that listener or viewer interests will go unrepresented may not be as plausible today. See, e.g., *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971); *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).

<sup>302</sup> The term "surrogate plaintiff" is used to distinguish cases in which plaintiff has no legally protected interest, direct or indirect, from cases, frequent in the *ius tertii* in constitutional litigation, in which plaintiff may derive a legally protected interest by virtue of his association with another whose interests are primarily protected. See Albert, *supra* note 281, at 464-73 (1974); Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974).

<sup>303</sup> 397 U.S. 150 (1970).

<sup>304</sup> *Id.* at 153. The Court simply announced the "arguably within the zone" test without any effort to justify the test by reference to past decisions or policy considerations. The "injury in fact" half of *Data Processing* is discussed at pp. 1737-47 *infra*.

<sup>305</sup> For example, where standing is available only if plaintiff's interest is legally protected, a court should, if possible, resolve that issue at the outset; a negative determination will terminate the litigation without the expense of further proceedings, while an affirmative answer will remove uncertainty with a potential saving of resources and increased possibility of settlement. If the issue cannot be resolved at the pretrial stage, the court can candidly say so. See Albert, *supra* note 281, at 495-97. However, the "zone of interests" test tends to discourage such an examination. See notes 306 & 310 *infra*.

<sup>306</sup> *Data Processing* warns of dismissal on the merits if plaintiff's interest is not legally protected. See 397 U.S. at 158. See also *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 20-21 (1942) (Douglas, J., dissenting). This suggests that a

an interest balancing model of agency decisionmaking because the validity of a given agency decision will turn to a significant degree on the court's evaluation of the legally relevant interests at stake.<sup>307</sup> Where standing is granted on a surrogate basis, the personal interests of the plaintiff should be disregarded in resolving the merits. But the "zone of interests" test may obscure the surrogate basis for standing and lead the court to focus incorrectly on the plaintiff's interests while disregarding the legally relevant consideration, the interests of third parties.

This potential danger is illustrated in *Data Processing, Arnold Tours, Inc. v. Camp*<sup>308</sup> and *Investment Company Institute v. Camp*,<sup>309</sup> where competitors were given standing to challenge agency rulings that expanded commercial activities by banks were not prohibited by the National Banking Act and the Glass-Steagall Act.<sup>310</sup>

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surrogate plaintiff might be granted standing under the "zone of interests" test only to lose on the merits even though the agency's action is contrary to the applicable statute. *But cf.* 397 U.S. at 154 ("private attorney general" theory acknowledged).

However, courts have in many cases routinely applied the "zone of interests" test to grant standing and then proceeded to decide the merits without specifically resolving the question whether plaintiff's interest is legally protected. *E.g.*, *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970), *on remand*, 472 F.2d 427 (1st Cir. 1972); *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971). *See also* *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972) (having gained standing, plaintiff may argue "public interest" considerations on the merits); *Albert*, *supra* note 281, at 496-97.

<sup>307</sup> Even if all relevant interests are identified, however, there remain conceptual difficulties in framing the merits where a number of interests are "legally protected." If "legally protected" is defined as violation of a legal duty running from the agency to plaintiff, then relief is afforded if plaintiff's factual allegations are accepted, but the test of standing then becomes circular. Moreover, can plaintiff *A* prevail on a showing of the agency's violations of a duty to *B*? On private law principles he could not, *see* note 337 *infra*, yet in *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972), the court stated that once having gained standing, a plaintiff might argue "the public interest" in attacking the legality of agency action, which suggests the extension of the surrogate principle to the merits. On the other hand, if the duty owed consists not in clear-cut "right" terms but only a vague requirement of due "consideration" of the interest in question, decision is loosed from fixed points of reference. *See* pp. 1776-84 *infra*.

<sup>308</sup> 400 U.S. 45 (1970), *on remand*, 472 F.2d 427 (1st Cir. 1972).

<sup>309</sup> 401 U.S. 617 (1971).

<sup>310</sup> The National Banking Act, 12 U.S.C. § 24(7) (1970), was the relevant statute in *Data Processing* and *Arnold Tours*, while the Glass-Steagall Banking Act of 1933, 48 Stat. 162 (1933), *codified in* 12 U.S.C. (scattered sections), was the controlling statute in *Investment Co. Institute*.

In affording standing to competitors the Court in *Data Processing* and *Arnold Tours* also relied upon the Bank Service Corporation Act of 1962, 12 U.S.C. § 1864 (1970), even though that Act applies by its terms to bank holding companies and not to banks. This reliance is an illustration of the lack of clarity in analysis which the vague "zone of interests" test promotes.



It is difficult to construe these two statutes as designed to protect firms with whom banks might potentially compete. It is far more reasonable to regard their limitations as protecting bank customers by ensuring the reliability and integrity of traditional banking services<sup>311</sup> which might be jeopardized if banks engaged in novel and possibly speculative new ventures. It is nonetheless possible to justify surrogate standing for competitors in order to protect the interests of individual users of bank services, who might well lack the organization or incentive to challenge violations of the Act. However, the use of the "zone of interests" test in the cited decisions obscured the surrogate basis of the competitors' standing. As a result, the courts in *Arnold Tours* and *Investment Company Institute* apparently focussed on the private interests of the competitors and ultimately construed the Acts to restrict competition.<sup>312</sup> Had the basis for standing been clarified, the courts might instead have focussed on the interests of users of bank services, and might therefore have looked more favorably on extensions of bank activities, especially if they contributed to covering overhead costs and thus reduced the costs of traditional bank services. Thus the *Data Processing* progeny suggest that failure to specify the ground on which standing is afforded may well lead to erroneous decisions on the merits.

Alternatively, the grant of standing for competitors in the *Data Processing* line of decisions may be interpreted as resting not on a surrogate rationale, but on the basis that competitors' interests are entitled to some consideration even if they are not "statutorily protected." Such an interpretation would mark a further dilution of the legally protected interest standard, and a further step in the direction of granting standing to any person adversely affected by agency action.<sup>313</sup> But if this is what is

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<sup>311</sup> See, with respect to the National Banking Act, *National Bank v. Matthews*, 98 U.S. 621 (1878), and authorities cited in *Arnold Tours, Inc. v. Camp*, 408 F.2d 1147, 1150-51 (1st Cir. 1969), cert. denied, 397 U.S. 987 (1970); with respect to the Glass-Steagall Act, *Investment Co. Institute v. Camp*, 401 U.S. 617, 639-42 (1971) (Harlan, J., dissenting).

<sup>312</sup> See *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970), on remand, 472 F.2d 427 (1st Cir. 1972); *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971). The *Data Processing* litigation was aborted by intervening statutory and administrative changes; see Scott, *supra* note 274, at 688 n.167.

By contrast, in *Reade v. Ewing*, 205 F.2d 630 (3d Cir. 1953), the court explicitly conferred standing on an individual in his capacity as a consumer rather than in his capacity as a competitor, making clear that only consumer interests were protected by federal food labelling laws.

<sup>313</sup> Professor Davis has long advocated extending standing to any person who has suffered "injury in fact." See 3 K. DAVIS, *supra* note 2, at 211-13. However, the concept of "injury in fact" is not free from ambiguity. See Albert, *supra* note 281, at 491; Scott, *supra* note 274, at 677; pp. 1737-47 *infra*.

intended, the courts should explicitly say so, rather than resorting to the "zone of interests" test to avoid thorough analysis.<sup>314</sup>

Finally, in those cases where plaintiff's standing to seek judicial review is based solely on his status as a surrogate for other interests, courts should consider the quality of representation provided by the surrogate, and should be alert to the possibility of conflicts between the interests of the surrogate and the interests of the class whose legally protected interests are supposedly being asserted.<sup>315</sup>

4. *Theory and Limits of Standing.* — The foregoing analysis only serves to raise more fundamental questions regarding the availability of the traditional model's protections. Why should standing normally be limited to those whose interests are legally protected? And why should "injury in fact" be a condition of standing? Why any limits on standing at all, beyond the case or controversy requirement of Article III?

For purposes of discussion, three different categories of interests may be identified:

- (1) material interests;
- (2) ideological interests;
- (3) the interest in enforcement of law.

An individual's material interests are those having to do with his economic or physical well-being. His ideological interests are those in the affirmation of moral or religious principles. The interest in the enforcement of law is the general concern of a member of a polity in the due obedience of its laws. We may also distinguish four classes of plaintiffs<sup>316</sup> who seek to protect interests through judicial review:

- (1) sole plaintiff;
- (2) class plaintiff;
- (3) associational plaintiff;
- (4) surrogate plaintiff.

The sole plaintiff represents his own interest. The class plaintiff represents himself and others who share the same interest. The

<sup>314</sup> See Albert, *supra* note 281, at 493-97. Decisions extending standing to disappointed government bidders to challenge awards as contrary to a statute or regulation seem to imply a belief that the interests of such contractors are entitled to some protection, yet employ a "public interest" rationale for standing that only serves to obscure proper analysis. See, e.g., *William F. Wilke, Inc. v. Department of the Army*, 485 F.2d 180 (4th Cir. 1973); *Blackhawk Heating & Plumbing Co. v. Driver*, 433 F.2d 1137 (D.C. Cir. 1970); *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970).

<sup>315</sup> See, e.g., *Reade v. Ewing*, 205 F.2d 630 (2d Cir. 1953).

<sup>316</sup> Unless the discussion of a particular decision makes other terminology appropriate, a person challenging agency action in court will be generally referred to throughout this Article as "plaintiff," even though in some review proceedings he might be styled "petitioner," etc.

associational plaintiff is an organization that represents the interests of its members. The surrogate plaintiff represents the interests of others.

(a) *The Requirement of a Legally Protected Interest.* — The legally protected interest test affords standing to those interests which an administrator is statutorily obligated to consider in taking action.<sup>317</sup> In applying this principle, courts have been willing to imply legal protection to an interest from the structure and purposes of the statute.<sup>318</sup> Given the vague, general or ambiguous nature of many statutory directives, and given the pervasive role of government in a developed economy, there appears to be no logical limit to this expansion of standing rights.<sup>319</sup> The rippling effects of a governmental decision on interests throughout the economic and social universe have no limits definable a priori.<sup>320</sup> To be sure, the question of standing in particular cases will be conditioned by the purposes and policies of the governing statute as the judge understands them<sup>321</sup> and by any statutory preclusion of standing to given classes of litigants. In addition, there are general considerations which suggest that standing should not be granted to all those whose interests might in some way be affected by agency policies.

The more remote and insubstantial the interest involved, the less may be the social interest in utilizing judicial machinery to protect it.<sup>322</sup> But there is more at work here than *de minimis non curat lex*. Public administration, as much as purely private ordering, depends to an appreciable degree on negotiated accommodation. An administrator and those with a stake in his decision may often prefer mutual compromise to the hazards of litigation. However, those participating in such a process of accommodation must be able to identify with fair precision the interests entitled to resort to legal action lest an agreed-upon compromise be challenged by a person representing an interest which had not been

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<sup>317</sup> Interests protected at common law also provide a basis for standing. See pp. 1723-28 *supra*.

<sup>318</sup> Of course, courts may grant or deny standing on the basis of their view of the merits or their desire to avoid reaching the merits. See Scott, *supra* note 274, at 683-90. But the former, while it undoubtedly occurs, cannot concern us here, for we are attempting to create a theory of process rights independent of, and indeed in the absence of, authoritative rules for decision on the merits.

<sup>319</sup> Of course, the statute may occasionally imply that review should be denied to certain litigants, see *Barlow v. Collins*, 397 U.S. 159, 167 (1970) (Brennan, J., concurring) but that does not help us to define the class of potential candidates.

<sup>320</sup> See generally J. SCHUMPETER, *HISTORY OF ECONOMIC ANALYSIS* 951-1053 (1954) (general equilibrium analysis).

<sup>321</sup> Cf. Chayes, *Some Further Last Words on Erie: The Bead Game*, 87 HARV. L. REV. 741, 753 (1974) (statutes must be understood by imputing purposes).

<sup>322</sup> See Scott, *supra* note 274, at 670-83.

consulted. Identification of groups that must be consulted dictates some limitation on standing based on the directness and significance of the interest impaired, however imprecise such notions must inevitably be. This suggests that standing should, under ordinary circumstances, be limited to those interests which the governing statute requires the administrator to consider and are therefore "legally protected."

Even in the strongest case for expansive standing — where the agency acts in flat violation of the governing statute — a stranger should not be permitted to challenge agency action. *Ex hypothesi*, not only the agency but all interests with a recognized stake are content with the unlawful policy.<sup>323</sup> Permitting a stranger to thwart such a mutually advantageous agreement would stifle creative compromise with the dead hand of past legislatures. Given the heavy demands on legislatures and their limited capacities, one cannot expect that statutes will be constantly amended to reflect changing conditions and new constellations of interests. The abstract concern for vindicating the bare words of statutes seems too attenuated a justification for disturbing mutually satisfactory arrangements struck by all of the relevant public and private interests. Accordingly, even in the case of plain statutory violations, we should view officials as bearing duties solely to the various interests which the legislature has recognized as entitled to consideration.<sup>324</sup> The question is not whether an agency violated "the law,"<sup>325</sup> but whether it has violated any duty owed

<sup>323</sup> There are, for example, several cases in which owners of existing, neighboring hotels sought to challenge the failure of urban redevelopment authorities who proposed to site a hotel in a redevelopment area to comply with a statutory requirement that transient housing needs be surveyed prior to any such construction. See *Berry v. Housing & Home Fin. Agency*, 340 F.2d 939 (2d Cir. 1965); *Pittsburgh Hotels Ass'n v. Urban Redevelopment Auth.*, 309 F.2d 186 (3d Cir. 1962), *cert. denied*, 372 U.S. 916 (1963); *Taft Hotel Corp. v. Housing & Home Fin. Agency*, 262 F.2d 307 (2d Cir. 1958), *cert. denied*, 359 U.S. 967 (1959). The most likely purpose of the requirement was to prevent unnecessary displacement of local residents. The residents of the renewal area, so far as appears, were entirely satisfied with the proposed construction, which might have brought them economic benefits or might have served as a bargaining chip for other concessions. Standing to the hotel owners was denied, and it would seem, properly.

Of course, it may be that the beneficiaries — local residents — were dissatisfied with the construction of the hotel but had neither the organizational nor the legal resources to mount a challenge, a circumstance which might call for surrogate standing on the part of the hotel owners. See pp. 1730-32 *supra*.

<sup>324</sup> See Albert, *supra* note 281, at 477-82. Such a multipolar concept of duty may pose significant difficulties, both at the level of analysis and in deciding particular cases. See pp. 1776-84 *infra*.

<sup>325</sup> But see B. SCHWARTZ & H. WADE, *LEGAL CONTROL OF GOVERNMENT: ADMINISTRATIVE LAW IN BRITAIN AND THE UNITED STATES* 291 (1972), which criticizes restrictive notions of standing on the ground that they leave "some agency free . . . to violate the law, [and] that is contrary to the public interest."

the plaintiff.<sup>326</sup> Moreover, since the identity of the parties entitled to invoke review may, as already suggested, influence the court's construction of a statute in its decision on the merits of the controversy,<sup>327</sup> permitting persons without legally protected interests to obtain review in such cases might seriously distort the process of statutory interpretation and lead to erroneous decisions.

Enforcement of the legally protected interest requirement to limit standing may impose burdens on courts and litigants that could be avoided by extending the right of judicial review to any person who might throw some light on the issues involved.<sup>328</sup> However, such a proposal would be inconsistent with our received view of the judges' role because it would tend to make the court a planning agency rather than a forum where relief can be obtained by persons asserting violations by officials of duties imposed by law. On traditional premises it is the agency and not the court that has been invested with residual discretion; court review should therefore normally be limited to ensuring that the agency operates within its discretion, giving fair treatment to those interests that the legislature has required it to consider.<sup>329</sup>

(b) *The Requirement of "Injury in Fact."* — Other limitations on the interests entitled to standing are implicit in the "injury in fact" requirement. This has a double aspect: first, the nature of the interest infringed; and second, the plaintiff's relation to the interest (which is discussed in the following section).

The "injury in fact" standard apparently encompasses all material interests. Since the *Data Processing* Court stated that "injury in fact" includes aesthetic, conservational, and recreational values as well as economic interests,<sup>330</sup> there do not seem to be any material interests that would fall outside the ambit of "injury in fact."

In *Sierra Club v. Morton*,<sup>331</sup> however, the "injury in fact"

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<sup>326</sup> See P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 156-57 (2d ed. 1973). Thus Justice Brennan rather begs the question when he objects to standing requirements more restrictive than "injury in fact" on the ground that "where wrongs to individuals are done . . . it is abdication for the courts to close their doors." *Barlow v. Collins*, 397 U.S. 159, 178 (1970) (Brennan, J., concurring), quoting *Flast v. Cohen*, 392 U.S. 83, 111 (1968) (Douglas, J., concurring).

<sup>327</sup> See pp. 1732-34 *supra*.

<sup>328</sup> See Note, *Public Participation in Federal Administrative Agency Proceedings*, 120 U. PA. L. REV. 702, 712, 730-31 (1972); cf. Gellhorn, *supra* note 66, at 376-83 (broad intervention in agency proceedings).

<sup>329</sup> It might be argued, however, that the burdens of applying standing tests outweigh the potential mischief in an unrestricted grant of standing to any willing litigant. See 3 K. DAVIS, *supra* note 2, at 217, 222; *id.* at 716-19 (Supp. 1970).

<sup>330</sup> 397 U.S. at 154. See also *Sierra Club v. Morton*, 405 U.S. 727 (1972).

<sup>331</sup> 405 U.S. 727 (1972).

test was applied to deny standing to an interest *prima facie* ideological<sup>332</sup>—the Sierra Club's asserted interest in the principle that wilderness areas should be preserved, quite apart from the use or enjoyment of such areas by its members.<sup>333</sup> This distinction between material and ideological interests might be justified on the ground that it is difficult to ascertain whether an ideological plaintiff will assert the professed interest with sufficient zeal to ensure an adequately litigated case or controversy. Or it may be that it is too difficult to distinguish strong and important ideological interests from those that are too trivial to justify the expenditure of judicial resources for their protection. But these considerations seem insufficient to justify a total exclusion of ideological interests from any general test of standing. It is possible to gauge the sincerity and strength of a person's commitment to ideological principles by what he has said or done,<sup>334</sup> and the problem of the insubstantiality of interests must frequently be faced even with material interests.<sup>335</sup> A flat rule that no ideological plaintiff can satisfy the "case or controversy" requirement of article III would likewise appear unjustified.<sup>336</sup>

<sup>332</sup> The Court's opinion betrays the ambiguity of the "injury in fact" test. It asserted that, on the pleadings, Sierra Club was not among the injured since it had not alleged that any of its members utilized the Mineral King Valley. But this simply begs the question as to the type of interest that qualifies for standing. If ideological interests qualify, the Sierra Club was presumptively "injured."

<sup>333</sup> While it appeared that members of the Sierra Club utilized the Mineral King Valley for recreational purposes, counsel for Sierra Club deliberately refrained from alleging that fact in the complaint, resting instead on the Club's general concern with environmental matters. See *Sierra Club v. Morton*, 405 U.S. 727 at 735-36 n.8 (1972). In short, counsel were seeking a permanent hunting license for the Club to challenge environmental degradation anywhere.

<sup>334</sup> The convictions entertained by an individual or group can be gauged by reference to past conduct. An individual or group that has engaged in extensive political, organizational or educational efforts on behalf of a principle should be regarded as *prima facie* a responsible spokesman for that principle. See *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1005 (D.C. Cir. 1966) (standing extended to organizations and individuals protesting racially discriminatory programming as "responsible spokesmen for representative groups having significant roots in the listening community"). While there may be difficulties in developing criteria for according standing to would-be ideological plaintiffs, they do not appear so grave as to justify a refusal to recognize any such plaintiffs. On the other hand, the "injury in fact" requirement does not necessarily guarantee responsible advocacy or the existence of a stake sufficient to justify the expenditure of judicial resources. It is ironic that the "injury in fact" test led, in *Sierra Club*, to denial of standing to a widely respected conservation organization, whereas in *United States v. SCRAP*, 412 U.S. 669 (1973), the same test supported an award of standing to an ad hoc group of law students formed for the purpose of instituting the litigation in question.

<sup>335</sup> Scott, *supra* note 274, at 670-83.

<sup>336</sup> See notes 350 & 361 *infra*. See also L. JAFFE, *supra* note 2, at 495-500. *But cf.* Albert, *supra* note 281, at 487-89.

The ultimate ground of the "injury in fact" test, reminiscent of the common law's focus on the protection of material interests,<sup>337</sup> may be in the contractarian theory of government. Put simply the theory is this: the justification for government lies in individuals' willingness to assent to a scheme of mutual cooperation that increases individuals' opportunity to satisfy their preferences.<sup>338</sup> Social action, when limited to the provision and allocation of material advantages, requires no general agreement on personal preferences or values. So long as only material interests are accorded protection by law, rules can be formulated which will enable each individual to pursue his own ends through a system of reciprocity that increases wealth, leisure, and the like, thus enlarging material opportunities for all.<sup>339</sup> If ideological interests are accorded legal protections, however, two basic difficulties emerge. First, ideological interests—for example, the interest in racial segregation in the public schools—often have an all or nothing feature, not admitting of more or less. If several conflicting ideological interests are accorded recognition, or even one ideological interest that conflicts with material interests, it may be impossible to achieve stable compromise.<sup>340</sup> Second, vindication of a litigant's ideological preferences may require others to acknowledge principles which they reject. But such enforced orthodoxy is contrary to contractarian premises; an agreement to share the fruits of cooperative endeavor is not an undertaking to embrace another's ideology.<sup>341</sup>

The interest in law enforcement can be viewed as a hybrid that is neither purely material nor purely ideological. Because the proper enforcement of law is important to the social security that underlies cooperative productivity and individual tranquility, it is not fanciful to find a material interest in correcting instances of official lawlessness. It is, however, difficult to fix the importance of such an interest in all but the most egregious cases. On the other hand, the interest in law enforcement may be regarded as an ideological attachment to the principle that the law be obeyed for its own sake. Either of these interpretations would explain the reluctance of federal courts to accord citizens standing to vindicate the general interest in official conformance to law.<sup>342</sup>

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<sup>337</sup> Thus the common law would not permit *A* to institute litigation to redress an injury suffered by *B* even if *A* (let us assume) were motivated by sincere humanitarian concerns. See Albert, *supra* note 281, at 440-41.

<sup>338</sup> See, e.g., J. RAWLS, *supra* note 15; R. NOZICK, *supra* note 104.

<sup>339</sup> See F. VON HAYEK, *LAW, LEGISLATION, AND LIBERTY* (1973); Heymann, *supra* note 92.

<sup>340</sup> See R. WOLFF, *supra* note 81, at 136-37.

<sup>341</sup> See J. RAWLS, *supra* note 15, at 205-16.

<sup>342</sup> See, e.g., decisions cited at note 359 *infra*. However, where there is official

Insofar as this interest is regarded as material rather than ideological, it may be denied protection under the limiting principles of remoteness, comparative insubstantiality, and the inability of an administrator to identify in advance potential plaintiffs whose objections may be accommodated through negotiation. Insofar as it is ideological, it falls before the traditional distrust of ideological interests.<sup>343</sup>

*Schlesinger v. Reservists Committee to Stop the War*<sup>344</sup> and *United States v. Richardson*<sup>345</sup> present variations on these themes in the context of asserted constitutional violations by officials. In *Richardson*, a citizen and taxpayer challenged statutory accounting provisions for the receipts and expenses of the Central Intelligence Agency as contrary to article I, section 9 of the Constitution requiring the publication of "a regular Statement and Account of the Receipts and Expenditures of all public Money . . . ." The *Schlesinger* plaintiffs, army reservists, citizens, and taxpayers, challenged military reserve membership by congressmen as contrary to the article I, section 6 prohibition against members of Congress holding "any Civil Office under the Authority of the United States." The Court dismissed both cases for want of standing.

Had the requirement of public accounting for funds involved in *Richardson* been statutory, the liberalized standing principles that emerged in the statutory context might have conferred standing on federal taxpayers to challenge violations of such a requirement.<sup>346</sup> The interest of a federal taxpayer in avoiding increased taxes, due to increased, wasteful spending be-

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corruption or other wrongdoing not directed at specific individuals and not subject to effective political controls, other jurisdictions have broadly expanded standing to persons seeking to challenge such wrongdoing. See *Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, 86 A.2d 201 (1952); L. JAFFE, *supra* note 2, at 462-500. The most general basis of "citizen standing" that has been developed in many such jurisdictions is the taxpayer suit. See *id.* at 472-73, 477-78 n.76. The taxpayer's suit may be regarded as a variant of standing based on material interest. Taxpayer status defines the particular interest which the court is to weigh in the balance in review of agency action—the interest in reducing public expenditure or avoiding an increased tax burden.

<sup>343</sup> See note 361 *infra*.

<sup>344</sup> 418 U.S. 208 (1974)

<sup>345</sup> 418 U.S. 166 (1974)

<sup>346</sup> Following *Flast v. Cohen*, 397 U.S. 83 (1968), *Richardson* requires "a logical nexus between the status asserted and the claim to be adjudicated," 418 U.S. at 174, which is simply another way of stating the statutorily protected interest rationale: standing is only afforded to interests shown to be implicated in the statutory purposes. However, it appears that in the constitutional context, a more "direct" connection is required than in the statutory context. For decisions granting standing to taxpayers in a statutory context, see note 348 *infra*.



cause of the failure to make public accounts,<sup>347</sup> is both material and individuated, and the fact that this interest is quantitatively minute and widely shared with others would not be grounds for denying standing under the liberal principles endorsed in *Sierra Club* and *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*.<sup>348</sup> However, the Court in *Richardson* refused to construe the public accounts provision in the Constitution as protecting taxpayers.<sup>349</sup> It, like the prohibition against members of Congress holding federal office involved in *Schlesinger*, was held to be for the benefit of citizens generally. Thus the interests of any citizen in enforcing such prohibitions could be viewed either as ideological or too insubstantially material to justify standing.

This result may be appropriate in constitutional adjudication, where a grant of standing to resolve the matter judicially may remove an issue entirely from the political process. Where issues affect the citizenry at large, and not an identifiable minority, standing should perhaps be denied, not because of the constitutional "case or controversy" requirement,<sup>350</sup> but because the matter can be adequately and perhaps more democratically resolved through the political process.<sup>351</sup>

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<sup>347</sup> *United States v. SCRAP*, 412 U.S. 669 (1973) suggests that in order to gain standing on this theory a taxpayer would first have to show that the failure to require accounts in fact results in increased spending (the "injury in fact" test). But as in *SCRAP* and *Schlesinger*, the purpose of the provision here is prophylactic, and it would tend to defeat its purpose to require a showing of actual harm; a showing of its probability should be sufficient. (Query, then, whether a draftee who could demonstrate a reasonable probability that continuation of the draft was attributable to Reserve membership by congressmen would have standing in *Schlesinger*.) Moreover, the *SCRAP* approach of automatically treating "injury in fact" as a threshold matter not only imposes potentially heavy and unwarranted burdens on plaintiffs, *see, e.g.*, *Utility Users League v. FPC*, 394 F.2d 16 (7th Cir.), *cert. denied*, 393 U.S. 953 (1968), but also raises the danger of a premature trial on the merits, *see Albert, supra* note 281 at 441, 495-97; *cf. O'Shea v. Littleton*, 414 U.S. 488, 497 (article III case and controversy must be established by more than general allegations).

<sup>348</sup> 412 U.S. 669 (1973). Indeed, courts have granted standing to taxpayer representatives to challenge unduly generous IRS treatment of other taxpayers. *See Tax Analysts & Advocates v. Schultz*, 376 F. Supp. 889 (D.D.C. 1974); *Tax Analysts & Advocates v. Simon*, C.A. No. 917-74 (D.D.C. 1974). *See generally* Tannenbaum, *Public Interest Tax Litigation Challenging Substantive IRS Decisions*, 27 NAT'L TAX J. 373 (1974); Thrower, *Public Interest Litigation to Affect Substantive Decisions, id.* at 389.

<sup>349</sup> This construction was no doubt shaped by the desire to avoid the precedent of *Flast v. Cohen*, 397 U.S. 83 (1968).

<sup>350</sup> As developed in Justice Powell's concurring opinion in *Richardson*, *see United States v. Richardson*, 418 U.S. 166, 180, the plaintiffs in *Richardson* and *Schlesinger* surely provided sufficiently focussed adversary zeal to satisfy the article III "case or controversy" requirement.

<sup>351</sup> *See* 418 U.S. at 188-89 (Powell, J., concurring). This argument, however,

In contrast to the constitutional litigation involved in *Schlesinger* and *Richardson*, the question of standing to challenge agency violations of legislative directives does not require an election between the judicial and the political process as the proper means of resolving the controversy. If standing is granted in a particular case, judicial resolution of the matter does not foreclose later legislative action, as it might in a constitutional context. In practice, judicial disposition in a statutory proceeding may effectively be final if the legislature has neither the resources nor the incentives to revise such disposition by amending the statute—but this may indicate that no legislative remedy was available to the plaintiff in the first place.<sup>352</sup> Even if the legislature does revise the judicial resolution of particular issues, this may imply only that judicial intervention was a necessary stimulant to legislative action rather than an infringement of legislative prerogatives.<sup>353</sup> In either case, resort to the judiciary may be necessary in order to secure effective outside scrutiny of the agencies' exercise of policy choice.

(c) *Class, Representational, and Surrogate Standing.*—Four possible relationships of a plaintiff to the interest sought to be protected (here dealing only with material interests) have been identified. The sole plaintiff represents his own interest, and ordinarily the legal system does not undertake to examine the adequacy of such representation any more than we seek to consider the rationality or efficacy with which an individual identifies and pursues his own interests generally. The class or rep-

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assumes the adequacy and fairness of the alternative political process. The challenge in both *Richardson* and *Schlesinger* was directed to the effectiveness and impartial functioning of the legislative-political process. The Court entertained a similar challenge by individuating the wrong to the citizenry at large in the "dilution" of an individual's vote in *Baker v. Carr*, 369 U.S. 186 (1962). Unlike the situation in *Baker*, however, denial of standing in *Schlesinger* and *Richardson* did not necessarily preclude judicial review of the issues involved. One might imagine the issues arising in a government defense to a suit by a congressman-Reserve member for a statutory Reserve allowance, or a defense to a prosecution under a criminal statute prohibiting public disclosure of CIA accounts.

<sup>352</sup> However, in at least some cases resource limitations may preclude legislative revision of the court's disposition even though the legislature believes it to be erroneous. In these cases, at least, court review is "undemocratic" to the extent that it imposes a solution different from that the legislature would adopt if the legislature acted. See *United States v. Richardson*, 418 U.S. 166, 189 (1974) (Powell, J., concurring). But, given the multiplicity of possible explanations for legislative inaction, it is probably wise not to draw any general inferences, one way or the other, from such inaction. In addition, it is questionable whether in a developed society the legislature should continue to be regarded as the sole proper forum for resolving conflicting social and economic interests. See pp. 1808-09 & note 605 *infra*.

<sup>353</sup> See pp. 1788-89 *infra*.

representative plaintiff, however, undertakes to represent the interests of others. While such mechanisms may be essential if representation is to be afforded to widely shared interests where the individual stake is small, questions may arise as to the adequacy of representation, as they may whenever one person undertakes to represent another's interests. Accordingly, the courts have, in the case of the class plaintiff, sought to impose a number of safeguards to promote the adequate representation of the class.<sup>354</sup> However, such safeguards have normally not been imposed in the case of the representative plaintiff, because it is assumed that, in order to survive, an organization must effectively represent the interests of a substantial proportion of its members, and that any member who objects strenuously to the representation afforded can resign.<sup>355</sup> Perhaps because of the assumed inherent safeguards of organizational representation, it has received broad judicial endorsement<sup>356</sup> as a device for realizing the standing rights newly granted to broad classes of interests.

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<sup>354</sup> First, the plaintiff must be a member of the class represented and his claim or defenses must be typical of the class so that there will at least be a formal congruity of interests tending to ensure that plaintiff's own self-interest will assure effective representation of the interests of the class. See 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 584-86, 610-13 (1972). Second, the courts may pass on whether the plaintiff will fairly and adequately represent the interests of the class. See *id.* at 615-30. Third, there may be means provided for members of the class to have some say on the question of their representation, either by "opting out" or attempting to take control of the litigation. See 7A *id.* at 139-62, 251-58. The difficulty is, however, that the interests asserted by the plaintiff for purposes of establishing the class to be represented may be only nominal; the dominating interest may sometimes be the suit's nuisance value. *Id.* at 427-28. The interests of the attorneys in fees and of the members of the class in advancing their interests may thus often conflict. The practice of awarding attorney's fees to public interest counsel, see pp. 1767-69 *infra*, could exacerbate this conflict.

<sup>355</sup> See A. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970). If, however, the association is not truly voluntary, as in the case of the closed shop union, the courts may attempt to provide a mechanism for representation of dissenting views within the organization. See Shapiro, *Some Thoughts on Intervention Before Courts, Agencies and Arbitrators*, 81 HARV. L. REV. 721, 767-72 (1968). See also M. OLSON, *supra* note 81, at 66-97.

<sup>356</sup> See, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972); *National Automatic Laundry and Cleaning Council v. Schultz*, 443 F.2d 689, 693-694 (D.C. Cir. 1971) (interest groups "indispensable part of effective channel of communication" between government and individuals). See also L. JAFFE, *supra* note 2, at 542-43. *But see Alameda Conservation Ass'n v. California*, 437 F.2d 1087, 1090 (9th Cir.), *cert. denied*, 402 U.S. 908 (1971) ("various clubs, political, economic and social now or yet to be organized, could wreak havoc with the administration of government"); *National Motor Freight Traffic Ass'n v. United States*, 205 F. Supp. 592 (D.D.C. 1962), *aff'd per curiam*, 371 U.S. 223 (1962) (associational standing denied).

Unlike the class or representative plaintiff, the surrogate plaintiff is supposed to represent the quite distinct interests of independent and unrelated third parties. Such an arrangement is fraught with potential conflicts of interest,<sup>357</sup> although there may be cases, like *Sanders* and *Data Processing*, where legally protected interests will not be represented at all unless through a surrogate plaintiff.

*Sierra Club* might be viewed as a case involving a would-be surrogate plaintiff, because the complaint may be read as asserting the material (and legally protected) interests of present and future users of Mineral King Valley. However, the complaint did not allege injury in fact to the material interests of Sierra Club members, even though such members apparently had used the Valley.<sup>358</sup> Since Sierra Club had thus conspicuously refused to claim standing as a representative plaintiff, the Court, understandably, did not explicitly decide whether Sierra Club should be afforded surrogate standing to champion the material interests of non-member users. However, in broadly asserting that a plaintiff must itself have suffered material injury, the Court apparently ruled out surrogate standing for ideologically motivated plaintiffs who seek to vindicate the material interests of others.<sup>359</sup>

There are two conceivable reasons that might justify a requirement that a surrogate plaintiff show material injury to itself. First, such a requirement may assure an adequately litigated case or controversy. But the case for making material injury the exclusive touchstone of adversary zeal is dubious.<sup>360</sup> Assuming that Sierra Club undertook to represent Valley users for ideological reasons, there are no grounds for supposing that

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<sup>357</sup> See pp. 1732-33 *supra*.

<sup>358</sup> See note 333 *supra*.

<sup>359</sup> In asserting the requirement that plaintiff must itself have suffered material injury, the court explicitly contrasted Sierra Club with the plaintiff in *Sanders Bros.*, who would have been subject to increased competition if the additional station had been licensed. *Sierra Club v. Morton*, 405 U.S. at 737 (1972).

<sup>360</sup> See note 334 *supra*. The advantages of a "bright line" test of material injury as a guarantee of an adequately litigated "case or controversy" are likely to be slight in the context of surrogate plaintiff cases. Such cases are relatively infrequent, and in determining whether such a plaintiff should be recognized, the court should inquire whether the surrogate plaintiff will adequately litigate the case and whether there is, under the particular circumstances, sufficient congruence between the interests of plaintiff and those interests that are legally protected to ensure that the latter interests will be served by permitting the litigation to go forward. There may, however, be difficulties in identifying and defining the absent, legally-relevant interests and the extent of conflict between such interests and those of the plaintiff before the court. These difficulties suggest that judges should be extremely cautious in extending surrogate standing.

it would litigate the case less vigorously than the plaintiff in *Sanders*, who was prompted by material considerations.<sup>361</sup>

The second possible justification for requiring a showing of material injury is to secure congruence between the surrogate's interest and the legally protected interest that will ensure that the latter will be adequately represented. But as *Sanders* and *Data Processing* indicate, such conflict of interest problems may be even more acute when the surrogate's interest is material than when its interest is only ideological.<sup>362</sup> In some contexts, such as with uncompensated guardians and trustees, standing is provided in spite of the plaintiff's lack of any material stake in the proceedings. Accordingly, a flat bar on standing for surrogate plaintiffs unable to show material injury of their own would be unwarranted.<sup>363</sup>

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<sup>361</sup> It has been asserted that the article III "case or controversy" requirement may preclude a grant of standing to one who does not himself suffer material injury, see *Natural Resources Defense Council, Inc. v. EPA*, 507 F.2d 905 (9th Cir. 1974); B. Schwartz, *FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD* 180 (1954), authorities cited in Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 *YALE L.J.* 816, 817 n.10 (1969). The better view would appear to be that such a grant would be constitutional. First, history does not clearly bar such a grant of standing. See *id.* at 825-27. Second, material injury is not necessarily a precondition of vigorous advocacy. See Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 *U. PA. L. REV.* 1033, 1037 (1968).

Nonetheless, the courts have studiously avoided recognizing any type of standing for plaintiffs whose own interest is solely ideological. The Establishment Clause of the first amendment would seem to provide a natural basis for according standing to ideological plaintiffs, but *Flast* insisted on the material touchstone of taxpayer status. See *Protestants and Other Americans United for Separation of Church and State v. Watson*, 407 F.2d 1264 (D.C. Cir. 1968) (association opposed to religious establishment must be taxpayer to secure *Flast* standing). See also *Allen v. Hickel*, 424 F.2d 944 (D.C. Cir. 1970) (persons objecting to religious display in public park grounds granted standing as park users). However, a sort of ideological interest standing was recognized in *McGlotten v. Connally*, 338 F. Supp. 448, 452 & n.17 (D.D.C. 1972) (black has standing to complain of racial discrimination against other blacks). See also *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208-12 (1972) (present tenants have standing to sue landlord to force it to comply with Fair Housing Act of 1968).

<sup>362</sup> See pp. 1730-34 *supra*. See also note 360 *supra*.

<sup>363</sup> The Court's ruling in *Sierra Club v. Morton*, 405 U.S. 727 (1972), might be justified as a construction of the Administrative Procedure Act, 5 U.S.C. § 702 (1970), which arguably codified the traditional insistence on material injury as a predicate to standing. *Sierra Club* should not, therefore, preclude entirely the possible development of standing for ideological plaintiffs (either direct or surrogate) under particular statutes. See *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608, 615-17 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); *cf.* *Citizens Comm. for the Hudson Valley v. Volpe*, 425 F.2d 97, 102 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970). *But see Chemehuevi Tribe v. FPC*, 489 F.2d 1207, 1212 n.12 (D.C. Cir. 1973), *vacated on other grounds*, 95 S. Ct. 1066 (1975) (*Sierra Club*, having

However, the Court's refusal to recognize Sierra Club as a surrogate plaintiff may well have been justified on the particular facts, even if a rigid rule against surrogate plaintiffs who lack material injury is unsound. Recognition of a surrogate plaintiff may create conflicts of interest and require additional judicial resources for approving and supervising the arrangement.<sup>364</sup> A compelling need for recognition of a surrogate plaintiff should be shown and, in *Sierra Club*, no such need was demonstrated because the Club could readily have obtained standing on a representative basis by alleging injury to its members' material interests.<sup>365</sup>

Today, cases that call for recognition of surrogate standing for ideological plaintiffs are likely to be comparatively infrequent, if only because a class action plaintiff's lawyer, a "public interest" lawyer, or an organization such as the Sierra Club will normally be able to locate a plaintiff, or allege injury to an organization member, who satisfies the expanding definition of legally protected material interest.<sup>366</sup> There may, however, be instances where only an ideological plaintiff, direct or surrogate, will suffice to secure representation of important affected interests.

V For example, there might be cases of environmental degradation in remote wilderness areas, where no individual may be able to establish material injury. Or there may be serious conflicts between the interests of those suffering immediate material injury and other, more remotely involved interests that should nonetheless be considered.<sup>367</sup> Problems of the latter sort are, for example,

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failed to allege injury to members, lacks standing under APA, and therefore lacks standing under judicial review provisions of Federal Power Act).

<sup>364</sup> See note 360 *supra*.

<sup>365</sup> See note 333 *supra*. Given the problems inherent in surrogate representation, there ought to be a showing that other, more direct forms of representation are unavailable. It might be preferable, however, to have the defendant assume the burden of persuasion on that issue once the would-be surrogate plaintiff has made a prima facie showing of nonavailability. The problems implicit in surrogate standing would arise in even more acute form if one were to accept Mr. Justice Douglas' suggestion that standing be accorded natural objects, such as the valley itself, through surrogate plaintiffs such as users of the valley. See *Sierra Club v. Morton*, 405 U.S. 727, 741-43 (1972) (Douglas, J., dissenting). See generally Stone, *Should Trees Have Standing? — Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972). For criticism of such proposals see Sagoff, *On Preserving the Natural Environment*, 84 YALE L.J. 205 (1974).

<sup>366</sup> See, e.g., *United States v. SCRAP*, 412 U.S. 669, 686-87 (1973).

<sup>367</sup> Thus in *Sierra Club* it is conceivable that present users of the valley might agree to its development in return for employment, short-term concessions, or other compensation, to the detriment of those potential future users of the valley who would prefer that it be kept in a wilderness state. However, there are serious

especially likely to be generated by governmental policies that have important effects on the preferences and well being of future generations; such policies may be especially deserving of careful judicial scrutiny that takes into account a variety of perspectives, some of which may not be represented by identifiable individuals suffering present material injury.<sup>368</sup> As such policy decisions become more frequent in a technologically developed society, the logic of representation for all affected interests is likely to generate mounting demands for extending standing to ideological plaintiffs and for expanded surrogate standing.<sup>369</sup> While the *Sierra Club* decision should not necessarily be read as foreclosing such developments, efforts to provide advocacy for nebulous "interests"—such as those of future generations—strain the logic of representation,<sup>370</sup> and risk turning the courts into "planning" agencies. These considerations dictate circumspection in further extensions of standing principles. Despite the dilution of the legally protected interest test and the recognition, in some cases, of surrogate standing, we have not yet embraced Professor Jaffe's "public action," under which the judge enjoys discretion to accord standing to any able, willing plaintiff in order to curb asserted official illegality.<sup>371</sup>

conceptual difficulties in providing representation for the interests of future generations. See note 370 *infra*.

<sup>368</sup> A group of scientists provided such a perspective on the AEC's liquid metal fast-breeder reactor program in *Scientists' Institute for Public Information, Inc. v. AEC*, 481 F.2d 1079, 1086 n.29 (D.C. Cir. 1973). The court found standing on the ground that the plaintiff organization, which was dedicated to the dissemination of information and stimulation of public debate relating to matters of scientific policy, was within the zone of interests to be protected by the relevant statute, the National Environmental Policy Act (NEPA). The interest of the SIPI members in the matter appears to have been ideological, yet it is just such an interest—when directed toward stimulating public scrutiny of governmental decisions—that NEPA was intended to foster. There does not appear to be any constitutional barrier to Congress' according standing to such an ideological interest. See note 361 *supra*.

The reasoning of the *SIPI* court seems far more sound than that in *United States v. SCRAP*, 412 U.S. 669 (1973), where the Supreme Court attempted to shoehorn a similar ideological plaintiff into the traditional material interest test, and made proof of such an interest a threshold issue.

<sup>369</sup> See sources cited at note 365 *supra*.

<sup>370</sup> For one person to be said to represent another, there must be some method of defining the latter's interests. Typically we assume that representation exists when there is a mechanism for formal accountability by the representative to the person represented. See generally H. PITKIN, *THE CONCEPT OF REPRESENTATION* (1967). Such formal accountability is impossible in the case of future generations. Moreover, since the present generation's policy choices may have a profound impact on future generations' preferences, see pp. 1704-06 *supra*, there may be no means of defining the interests of future generations without floundering in hopeless circularities.

<sup>371</sup> See L. JAFFE, *supra* note 2, at 459-500. Contemporary standing decisions

*E. Developing a Model of Interest Representation —  
The Expansion of Participation Rights Before the Agency*

Standing is a question of the right to seek judicial review. It does not, in and of itself, entail the right to participate in proceedings before the agency, much less the full panoply of procedural rights implied by the traditional model. There are two basic categories of agency participation rights: the right to intervene in administrative proceedings initiated by others and the right to require the agency to initiate such proceedings.<sup>371a</sup>

1. *Intervention.* — Under traditional principles of standing, persons denied access to judicial review were nonetheless frequently permitted to intervene in proceedings before the agency.<sup>372</sup> In some cases, liberal intervention rights at the agency level were held to be mandated by the agency's governing statute,<sup>373</sup> or by the Administrative Procedure Act.<sup>374</sup> In others,

present a number of features that are inconsistent with Professor Jaffe's "public action." As *Data Processing* and *Sierra Club* illustrate, the grant or denial of standing is rarely, if ever, treated as discretionary; the effort is rather to resolve standing issues by fixed rules of general application. In addition, the retention by the Supreme Court of the "zone of interests" and "injury in fact" requirements indicates that standing is still bottomed on the protection of private interests in avoiding material injury rather than on the "private attorney general" rationale advocated by Professor Jaffe. Finally, while Professor Jaffe would limit "public action" standing to cases where illegality is clear and there is an overriding public interest in curbing official illegality, broadened standing rights are routinely awarded in cases — such as *Scenic Hudson* and *SCRAP* — where illegality is not at all clear.

The "public action" is premised on the view that there is an ascertainable public interest which the judge can identify and vindicate. See L. JAFFE, *supra* at 486-90. But the extension of the traditional model, in which expanded standing plays an important role, is responsive to the loss of faith in the existence of any single public interest and the consequent need to dissolve questions of governmental policy into a process of compromise among affected interests.

<sup>371a</sup> The following discussion focuses on participation rights in agency adjudication, since it is customary to permit any person to participate in notice and comment rulemaking pursuant to 5 U.S.C. § 533 (1970). However, the extent of the right to participate in "on the record" rulemaking proceedings pursuant to 5 U.S.C. § 533(c) (1970) is uncertain, see Comment, *Public Participation in Rulemaking Procedures under the Outer Continental Shelf Lands Act*, 56 IOWA L. REV. 696 (1971), as is the extent to which persons can require the agency to initiate rulemaking except where the governing statute so provides.

<sup>372</sup> See, e.g., *Pittsburgh & W. Va. Ry. v. United States*, 281 U.S. 479 (1930); *Alexander Sprunt & Son, Inc. v. United States*, 281 U.S. 249 (1930).

<sup>373</sup> See, e.g., *City of Houston v. CAB*, 317 F.2d 158 (D.C. Cir. 1963) (construing Federal Aviation Act §§ 408(b), 1006(a), 49 U.S.C. §§ 1378(b), 1486(a) (1970), to grant intervention of right to any "interested person"); *Atomic Energy Act* § 189, 42 U.S.C. § 2239(a) (1970) (AEC "shall admit" as party "any person whose interest may be affected by the proceeding"). But cf. *City of San Antonio v. CAB*, 374 F.2d 326, 332 (D.C. Cir. 1967) (limiting right to intervene where otherwise "hundreds" of parties with equal interest might intervene).

<sup>374</sup> In *American Communications Ass'n v. United States*, 298 F.2d 648 (2d Cir.



statutes granted agencies broad discretion to permit intervention,<sup>375</sup> a discretion which many agencies exercised liberally.<sup>376</sup>

This differential allocation of participation rights before courts and agencies harmonized with the differing functions of the two institutions under the traditional model.<sup>377</sup> The agency was given front-line responsibility to fashion national policy in a given field of governmental responsibility. Participation by a broad range of affected interests was likely to aid in the agencies' policymaking by generating alternatives and documenting their impact on the various components of the collective social welfare.<sup>378</sup> The courts, on the other hand, were charged with the more limited function of defending legally protected private interests against the unauthorized imposition of governmental sanctions.

This allocation of functions and participation rights began to break down with the dilution of the legally protected interest test for standing and the use of the surrogate plaintiff technique. The class of interests entitled to seek judicial review has become more nearly congruent with the class entitled to intervene in administrative proceedings. Indeed, courts have sometimes afforded standing to persons who had been excluded from agency proceedings,<sup>379</sup> and it has been argued that the right to judicial review should, in many instances, be granted more liberally than the right to intervene in agency proceedings. Permitting intervention of additional parties may seriously complicate and prolong trial-type proceedings before agencies.<sup>380</sup> By contrast,

1962), the court relied, as an alternative ground, on Administrative Procedure Act § 6(a), 5 U.S.C. § 1005(a) (1964), to require the granting of intervention to a person alleging competitive injury. *But see* Shapiro, *supra* note 355, at 766 (APA should be interpreted to provide the agencies with considerable discretion in granting participation rights).

<sup>375</sup> See, e.g., Federal Power Act § 308, 16 U.S.C. § 825(g) (1970); Natural Gas Act § 15, 15 U.S.C. § 717n(a) (1970); Interstate Commerce Act §§ 2, 13, 49 U.S.C. §§ 42, 13(1) (1970); Labor-Management Relations Act § 10(b), 29 U.S.C. § 160(b) (1970).

<sup>376</sup> See, e.g., 29 C.F.R. § 102.8 (1973) (NLRB); K. DAVIS, *supra* note 2, at 569-70 (ICC); Note, *supra* note 328, at 817, 819 (FPC).

<sup>377</sup> Additionally, judicial review may be restricted by the Article III case or controversy requirement.

<sup>378</sup> See *American Communications Ass'n v. United States*, 298 F.2d 648, 650 (2d Cir. 1962). In pluralist terms, widespread participation rights are more likely to generate broadly acceptable policies.

<sup>379</sup> See pp. 1750-51 & notes 385, 386 *infra*.

<sup>380</sup> See, e.g., Jaffe, *Judicial Review of Procedural Decisions and the Philco Cases, Plus ça Change?*, 50 GEO. L.J. 661 (1962); Note, *supra* note 328, at 782, 804. These adverse effects may be mitigated by the use of statutory provisions and agency rules providing for limited forms of participation short of full party status. See Gellhorn, *supra* note 66, at 387-88; Note, *supra*, at 744-46, 781-87.

broader grants of standing may not entail such serious resource costs.<sup>381</sup> Moreover, to the extent that an agency's violation of statutory directives can be clearly identified, a party need not have participated in the proceedings below in order to call such a transgression to the attention of the reviewing court.<sup>382</sup>

The argument for granting standing more broadly than the right to intervene before the agency is, however, fundamentally inconsistent with the logic of the traditional model's expansion. In the absence of meaningful statutory directives and of an ascertainable public interest,<sup>383</sup> just results are defined by a process in which all affected interests participate and are considered. The courts' role is limited to evaluating the adequacy of the agency's consideration of affected interests in the light of the statutory scheme and the particular facts.<sup>384</sup> Accordingly, in order to secure meaningful judicial review, those with standing rights must also have participated in the agency process of decision and have had an opportunity to contribute to the record. A right to intervene in agency proceedings is most clearly justified when party status before the agency is a statutory predicate to judicial review.<sup>385</sup> But even where participation before the agency is not a precondition to review, courts have required that intervention be granted to those enjoying standing, on the rationale that "fairness requires that one with such a recognized interest in the outcome of the agency proceeding must be permitted to participate in it from the outset," and that "intervention is necessary to make the right to review effective."<sup>386</sup>

Accordingly, as courts have expanded standing rights through dilution of the legally protected interest test and surrogate principles, they have mandated a corresponding expansion of the right to intervene in agency proceedings. For example, in *United*

However, as anyone experienced with the conduct of hearings by trial examiners will testify, such limitations are often not rigorously enforced if they are utilized at all. See, e.g., *Palisades Citizens Ass'n v. CAB*, 420 F.2d 188 (D.C. Cir. 1969).

<sup>381</sup> See, e.g., *L. JAFFE*, *supra* note 2, at 524-26.

<sup>382</sup> *Id.* at 524-25.

No doubt a right to participate at the administrative level increases the effective scope of the right to appeal, but the right to attack an order resting on a record made by others, or on no record at all, could be valuable. It would have precisely the virtue of expanding the class of potential public champions to attack "obviously" invalid orders without a similar expansion of the administrative process.

<sup>383</sup> See pp. 1683-84 *supra*.

<sup>384</sup> See pp. 1786-87 *infra*.

<sup>385</sup> See, e.g., *National Coal Ass'n v. FPC*, 191 F.2d 462 (D.C. Cir. 1951). See also *Virginia Petroleum Jobbers Ass'n v. FPC* 265 F.2d 364, 368 (D.C. Cir. 1959).

<sup>386</sup> *American Communications Ass'n v. United States*, 298 F.2d 648, 650 (2d Cir. 1962). See also *Seaboard Western Airlines, Inc. v. CAB*, 181 F.2d 515 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 963 (1950); *Elm City Broadcasting Corp. v.*

*Church of Christ*, the court held that "responsible" listener representatives were not only entitled to judicial review of FCC license renewals, but were also entitled to participate in agency proceedings. In the face of the inability of agency staff to represent listener interests adequately, such intervention may be necessary "to bring programming deficiencies or offensive over-commercialization to the attention of the Commission in an effective manner" and to ensure that the "*legitimate* interests of listeners can be made part of the record which the Commission evaluates" and the court reviews.<sup>387</sup>

Today, the right to judicial review and the right to participate in agency proceedings are presumptively congruent. A person might conceivably be denied intervention before the agency on the ground that his interest was already adequately represented by another party, and yet be permitted to seek judicial review if the other party failed to do so,<sup>388</sup> but such cases are likely to be rare.<sup>389</sup> In practice, a wide variety of affected interests will be able to obtain judicial review of an agency's consideration of the interests and issues involved in a given policy choice, and will

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United States, 235 F.2d 811 (D.C. Cir. 1956); *FCC v. NBC Co. (KOA)*, 319 U.S. 239 (1943) (right to seek judicial review and to intervene in agency proceedings are coextensive).

The rationale of the *American Communications* and *Elm City* decisions — which reflect a belief that the interests of competitors should be entitled to consideration for their own sake — is inconsistent with Professor Jaffe's model of the "public action," for if one is granted standing only to vindicate the public interest in legality, it is by no means clear that participation in the proceedings below is required.

<sup>387</sup> *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1005 (D.C. Cir. 1966). The court discounted government warnings that agencies might be inundated with intervenors, pointing to the costs of litigation as a significant restraining factor. The court also indicated that the agency might impose reasonable restrictions on listener intervention, and limited its holding to a requirement that at least one of the four petitioners be admitted as parties to the proceedings; the FCC, on remand, admitted all four as parties, *see* 425 F.2d 543 (D.C. Cir. 1969). *See also* *National Welfare Rights Organization v. Finch*, 429 F.2d 725, 736 (D.C. Cir. 1970), where in the context of HEW proceedings to terminate federal AFDC assistance grants to state authorities, welfare recipients were held to have standing under *Data Processing* to seek judicial review and also to have a corresponding right to intervene in agency proceedings to protect their right to review even though the applicable statute provided solely for standing and agency participation by states. However, the court stressed the agency's power to manage proceedings before it to avoid excessive burdens and expressly declined to require the agency to admit NWRO to informal prehearing negotiations, provided for by agency regulations, between HEW and the states. *But cf.* *Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970).

<sup>388</sup> *Shapiro*, *supra* note 355, at 767; Note, *supra* note 328, at 710.

<sup>389</sup> On the other hand, there may be parties admitted to administrative proceedings who cannot satisfy prevailing tests of standing, but such interests will be infrequent in view of the liberality of those tests.

enjoy a correlative right to participate in proceedings before the agency in order to build a record for such review.

2. *Initiation.* — The right to participate in formal agency proceedings or to seek judicial review of agency orders is of little consequence if the agency develops policy or disposes of controversies by informal processes to which these rights do not attach. Traditionally the courts have not asserted a general power of visitation over the informal processes of administration.<sup>390</sup> In particular, the agency's decision whether or not to institute enforcement proceedings<sup>391</sup> and its informal settlement procedures<sup>392</sup> have not normally been subject to judicial review<sup>393</sup> despite the possibility that agency laxity might result in inadequate protection for the putative beneficiaries of the administrative scheme. Rather, agency decisions on priorities and basic policy have remained outside judicial purview unless and until crystallized in formal proceedings. But recent criticism of agency performance has provoked a shift in traditional doctrine. After all, it is in informal processes of decision that the advantages in representation enjoyed by organized interests may be most telling.<sup>394</sup> Even if formal proceedings are eventually held, the agency's policy commitments may have already been set, and the "public hearings [may be] mere window dressing."<sup>395</sup> As a result, courts have moved cautiously to require, at the insistence of "public interest" litigants, that hitherto informal policy decisions be taken through formal proceedings.<sup>396</sup>

In a celebrated case, *Medical Committee for Human Rights v.*

<sup>390</sup> For numerous examples of traditional judicial reluctance either to review informal agency action or subject it to judicial controls, see K. DAVIS, *supra* note 25, at 155-56.

<sup>391</sup> *Moog Indus. v. FTC*, 355 U.S. 411 (1958); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950); Jaffe, *The Individual Right to Initiate Administrative Process*, 25 IOWA L. REV. 485 (1940).

<sup>392</sup> *But cf. Cascade Natural Gas Co. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

<sup>393</sup> See K. DAVIS, *supra* note 25, at 22 (1969).

<sup>394</sup> See Note, *supra* note 328, at 826-28; Schotland, *After 25 Years: We Come to Praise the APA and Not to Bury It*, 24 AD. L. REV. 261, 266-67 (1972).

<sup>395</sup> Green, *Safety Determination in Nuclear Power Licensing: A Critical View*, 43 NOTRE DAME LAW. 633, 642 (1968). See also Cavers, *Administering that Ounce of Prevention: New Drugs and Nuclear Reactors — II*, 68 W. VA. L. REV. 233, 242 (1966).

<sup>396</sup> Professor Jaffe was an early advocate of expansion of the rights of identifiable beneficiaries of an administrative scheme to require the exercise of agency power in their favor, particularly where analogous private remedies are unavailable; otherwise "[i]nterests intended as the beneficiaries of legislative munificence will have cold comfort from embracing the dry, unmoving skeleton of the statute." Jaffe, *supra* note 391, at 485. See also K. DAVIS, *supra* note 25, at 162-72; Gellhorn, *supra* note 66, at 384-86.

SEC,<sup>397</sup> the plaintiff organization, a holder of a few shares of Dow Chemical Company stock, requested that Dow include in management's proxy materials a proposal to discontinue the manufacture of napalm. The Dow Company refused. The Committee requested that SEC staff investigate Dow's refusal, claiming that it violated SEC proxy regulations. The staff subsequently issued to Dow a "no action" letter stating that it would not recommend action if Dow omitted the proposal. The Commission subsequently declined, by letter, to overrule the staff's position.

Although what was realistically at stake was the Commission's exercise of discretion in whether to institute proceedings to redress violations of its rules, the court held that the SEC's position was reviewable and that the Medical Committee had standing to seek such review.<sup>398</sup> The Court specifically rejected the notion that judicial review might be excluded because "prosecutorial discretion" was involved, castigating the Commission's "secretive decision making" as having the effect of favoring management<sup>399</sup> and asserting that judicial review was necessary to ensure adequate protection for shareholder interests. The court rejected the Commission's arguments that review of its informal "no action" procedures would promote an undesirable degree of formality in such proceedings, and a consequent diversion of agency resources, and instead held that formal agency proceedings would have positive virtue in promoting judicial and public scrutiny of agency choices.

Similarly, in *Environmental Defense Fund, Inc. v. Ruckelshaus*,<sup>400</sup> a decision by the EPA not to institute formal proceed-

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<sup>397</sup> 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972).

<sup>398</sup> The applicable statute provided for review by any "person aggrieved." Securities Exchange Act of 1934 § 25(a), 15 U.S.C. § 78y(a) (1970).

<sup>399</sup> The court criticized "the lack of articulated bases for past decisions [which] encourages management to file shotgun objections to a shareholder proposal" and prevents the shareholder from ascertaining

why his proposal was deemed unworthy or what he can do to cure its defects [the net result] being merely another manifestation of the venerable bureaucratic technique of exclusion by attrition, of disposing of controversies through calculated non-decisions that will eventually cause eager supplicants to give up in frustration and stop "bothering" the agency.

432 F.2d at 674.

However, in *Kixmiller v. SEC*, 492 F.2d 641 (D.C. Cir. 1974), the court declined to extend its *Medical Committee* ruling to a case where the SEC staff had formally stated that it would not recommend action by the Commission against a corporation that declined to include a shareholder proposal in management proxy materials but where the Commission had not formally reviewed the staff's position, holding that there was no reviewable "order" by the Commission under the relevant jurisdictional statute. But in a subsequent case where the staff's position was reviewed by the Commission, *Medical Committee* was followed. See *Potomac Federal Corp. v. SEC*, 35 Ad. L.2d 211 (D.D.C. 1974).

<sup>400</sup> 439 F.2d 584 (D.C. Cir. 1971).

ings to cancel the registration of the pesticide DDT was held subject to judicial review.<sup>401</sup> The court, which had earlier granted standing to environmental groups seeking review of agency failure to take action against the use of certain pesticides,<sup>402</sup> held that since the environmental groups had raised substantial questions relating to DDT's safety, that issue should be resolved through formal cancellation proceedings rather than the informal processes of deciding whether to institute such proceedings.<sup>403</sup>

In so ruling, the court asserted that:<sup>404</sup>

[When] Congress creates a procedure that gives the public a role in deciding important questions of public policy, that procedure may not lightly be sidestepped by administrators . . . . The statutory scheme contemplates that these questions will be explored in the full light of a public hearing and not resolved behind the closed doors of the [agency] . . . .

Public hearings bring the public into the decision-making process, and create a record that facilitates judicial review.

Courts have, in a variety of other contexts, utilized techniques

<sup>401</sup> The governing statute was the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 135 (Supp. III 1974). Substances governed by the Act must have an approved registration in force in order to be marketed.

<sup>402</sup> *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970); *Environmental Defense Fund, Inc. v. HEW*, 428 F.2d 1083 (D.C. Cir. 1970).

<sup>403</sup> In so ruling, the court relied on the legislative history and provisions of the FIFRA. See 439 F.2d at 592-95.

<sup>404</sup> 439 F.2d at 594-95 (footnotes omitted). The *Ruckelshaus* court was apparently concerned to illuminate the basis for informal agency decisions in order to facilitate judicial review and ensure adequate protection for the purported beneficiaries of the statutory scheme. See 439 F.2d at 598. See also *Brooks v. AEC*, 476 F.2d 924 (D.C. Cir. 1973) (hearing required on extension of construction deadline of nuclear plant opposed by local residents); *Citizens Committee v. FCC*, 436 F.2d 263 (D.C. Cir. 1970) (hearing required on license transfer that would eliminate classical music format); *City of Portland v. FMC*, 433 F.2d 502 (D.C. Cir. 1970) (hearing required on pooling agreement with asserted anticompetitive effects); *Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970) (invalidating CAB use of informal proceedings to approve proposed fare increase, thereby foreclosing consumer representation in formal proceedings); *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) (chastising FCC for failing to provide formal hearing on broadcasting license renewal, effectively preventing participation by viewer representatives); *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966) (reversing FPC denial of full hearing on power project alternatives proposed by "public interest" representatives). See also *REA Express, Inc. v. CAB*, 36 Ad. L.2d 41 (2d Cir. 1974) (judicial review of agency failure to institute enforcement proceedings); *Trailways of New England, Inc. v. CAB*, 412 F.2d 926, 931 (1st Cir. 1969) (same). However, statutory beneficiaries have thus far been denied standing to challenge official failures to institute criminal prosecutions. *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973); *Nader v. Saxbe*, 497 F.2d 676 (D.C. Cir. 1974).

similar to those employed in *Medical Committee* and *Ruckelshaus* in order to scrutinize hitherto informal agency choices on regulation and enforcement priorities.<sup>405</sup> By affording all affected interests with a recognized stake in agency policy the right to demand and participate in such procedures, *Medical Committee*, *Ruckelshaus*, and the cases following them facilitate effective judicial review of asserted agency laxity or bias. When the agency has clearly failed to protect the beneficiaries of the administration scheme, courts have gone so far as to mandate appropriate enforcement measures. For example, judges have required HEW to enforce Title VI of the 1964 Civil Rights Act;<sup>406</sup> HUD to ensure removal of lead paint from the interior of federally subsidized housing;<sup>407</sup> the Interior Department to protect Indians from exploitation by trading posts;<sup>408</sup> the FHA to ensure that federally insured housing meets local code requirements;<sup>409</sup> and the Secretary of the Treasury to protect domestic milk producers from assertedly unlawful competition.<sup>410</sup> Where the agency has already initiated enforcement proceedings, courts have, in selected cases, scrutinized settlements of these proceedings.<sup>411</sup> The judges have thus begun to assume the ultimate protection of the collective

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<sup>405</sup> See, e.g., decisions cited note 404 *supra*. Decisions expanding judicial review without purporting to require formal agency proceedings in which affected interests are entitled to participate may have that effect in practice. For example, in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), approval by the Secretary of Transportation of a given highway location was held to be reviewable for conformance to statutory standards. The applicable statute did not require a decision based on formal proceedings, but the Court held that in the absence of an adequate record developed through such proceedings, persons challenging the Secretary's decision could seek to ascertain the bases of that decision by, *inter alia*, examining the Secretary and his assistants. Such scrutiny poses serious risks for the agency, and provides a powerful incentive for the adoption of more formal procedures of decision that can yield a ready-made basis for court review. These risks are apparent in *District of Columbia Fed'n of Civic Ass'ns, Inc. v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972), where an evidentiary hearing held pursuant to *Overton Park* revealed an embarrassing contradiction between previous statements by the Secretary and the facts developed at the hearing, 459 F.2d at 1238 & n.20, as well as the existence of covert congressional pressures to influence the decision, *id.* at 1245-46.

<sup>406</sup> *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc).

<sup>407</sup> *City-Wide Coalition Against Childhood Lead Paint Poisoning v. Philadelphia Housing Authority*, 356 F. Supp. 123 (E.D. Pa. 1973).

<sup>408</sup> *Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971).

<sup>409</sup> *Davis v. Romney*, 490 F.2d 1360 (3d Cir. 1974).

<sup>410</sup> *National Milk Producers' Fed'n v. Shultz*, 372 F. Supp. 745 (D.D.C. 1974).

<sup>411</sup> See, e.g., *Cascade Natural Gas Co. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967) (Justice Department settlement of antitrust action reviewable at instance of affected third parties); *ILGWU Local 415-475 v. NLRB*, 501 F.2d 823 (D.C. Cir. 1974) (NLRB settlement of charge against employer reviewable at behest of union).

social interests which administrative schemes were designed to secure.<sup>412</sup>

*F. Developing a Model of Interest Representation —  
The Requirement of Adequate Consideration*

In addition to extending formal participation rights to a greater range of relevant affected interests, reviewing courts have imposed on administrators the duty to consider adequately all participating interests in decisions on agency policy.

So long as controversies remained bipolar in form and character — the citizen versus the government — it remained possible to conceive of administrative law as a means of resolving the conflicting claims of governmental power and private autonomy. However, the expansion of the traditional model to include a broader universe of relevant affected interests has transformed the structure of administrative litigation and deprived the simple notion of restraining government power of much of its utility. In multipolar controversies, demarcation of distinct spheres of governmental and private competency may no longer be feasible, and the non-assertion of governmental authority may be itself a decision among competing interests. Failure to grant a license for a power plant, for example, may protect environmental interests at the expense of power consumers, while failure to remove ineffectual drugs from the market may preserve manufacturers' welfare at the expense of patients.<sup>413</sup> Moreover, broad statutory directives are likely to be conspicuously unhelpful in deciding multipolar controversies, and the possibility of developing an enriched theoretic structure of rights and responsibilities which might re-

<sup>412</sup> As an alternative to requiring agencies to institute administrative proceedings to protect the beneficiaries of regulatory schemes, courts have allowed beneficiaries to institute court proceedings directly to enforce the relevant statute. *See, e.g.,* *Gomez v. Florida State Employment Service*, 417 F.2d 569 (5th Cir. 1969) (migrant farm workers' private action to enforce federal statute protecting their working conditions); *Common Cause v. Democratic Nat'l Comm.*, 333 F. Supp. 803 (D.D.C. 1971) ("citizen" civil enforcement of criminal statutes regulating campaign financing). *Contra*, *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453 (1974) (private suit precluded by relevant statute). For discussion of the relation between proceedings to require agency enforcement of a statute and the implication of private actions under such a statute, see generally *Jaffe, supra* note 391.

<sup>413</sup> *See* *American Public Health Ass'n v. Veneman*, 349 F. Supp. 1311 (D.D.C. 1972). Even in the traditional model, the relations involved were not strictly bipolar. For example, the interests of consumers in safe and/or cheap drugs would be involved in the confrontation between the government and the drug manufacturer, but these interests are so diffuse and individually insubstantial, and so removed from the interests entitled to protection of common law, that in practice they have not been considered, or have been remitted to agency protection.



solve the ensuing decisional complexities<sup>414</sup> is as yet unrealized. Accordingly, clearcut rules of decision are unlikely to emerge; agency decisionmaking becomes of necessity a process of striking a case by case balance among the various competing interests recognized by the applicable statute as relevant factors in policy choice.<sup>415</sup> The logic of the pluralist model requires the agency to give adequate regard to each of the competing interests<sup>416</sup> so that the resulting policy may reflect their due accommodation.

The right simply to appear and present evidence and argument in agency proceedings, while not in itself inconsequential,<sup>417</sup> would be greatly diminished in value if agencies were free to disregard the interests of those entitled to participate. Accordingly, courts have imposed upon agencies an affirmative duty to consider all the relevant interests affected by agency policy. For example, in the first *Scenic Hudson* decision<sup>418</sup> the FPC's approval of a hydro-electric facility was set aside and remanded for further proceedings on the ground that the Commission had inadequately considered alternatives to the proposed project. In particular, the decision rested on the Commission's failure to deal with testimony offered by Hilltop Cooperative of Queens, "a taxpayer and consumer group," in support of an assertedly superior gas turbine generator alternative even though that testimony was far from compelling and was proffered long after the conclusion of evidentiary hearings and oral argument before the Commission.<sup>419</sup> In thus disregarding ordinary standards of timely procedure<sup>420</sup> the court stressed that the agency bore an affirmative duty to consider all affected interests in the light of alternative policy

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<sup>414</sup> See Tribe, *supra* note 172, at 1338-46.

<sup>415</sup> See, e.g., Public Service Comm'n v. FPC, 467 F.2d 361, 367 (D.C. Cir. 1972) (approving FPC "experimentation" to "reach an accommodation of conflicting interests"). See also Albert, *supra* note 281, at 477-83; Gifford, *Decisions, Decisional Referents, and Administrative Justice*, 37 LAW & CONTEMP. PROB. 3 (1972).

<sup>416</sup> See L. JAFFE, *supra* note 2, at 508; Reich, *supra* note 67, at 1260-61 (function of litigation against government not necessarily to "win," but to "force the government to pay attention to a particular point of view").

<sup>417</sup> See pp. 1770-72 *infra*.

<sup>418</sup> *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). The subsequent history of *Scenic Hudson* is examined at pp. 1777-78 & notes 512-14 *infra*.

<sup>419</sup> See 354 F.2d at 616-20.

<sup>420</sup> This relaxation of adversary principles may be seen as an attempt to compensate for the lack of resources of public interest litigants, and to counterbalance a perceived tendency by the agency to favor organized interest. Compare *Friends of the Earth v. AEC*, 485 F.2d 1031, 1033 (D.C. Cir. 1973) (Bazelon, J.) (because AEC licensees have greater resources than environmental groups, AEC may be obliged to "seek out experts representing varied and opposing technical views").

choices,<sup>421</sup> and indicated that such duties might extend to persons and groups not represented as parties.<sup>422</sup>

The principle that the agency owes special duties to the beneficiaries of a regulatory scheme was also stressed in the second *Church of Christ*<sup>423</sup> decision. Following the hearing mandated by the first decision, the FCC found that the listener representatives had failed to establish that the licensee's program was racially discriminatory, and renewed the license. On review, the court condemned the agency for effectively putting the burden of production and of persuasion on the viewer representatives. The Commission, the court asserted, had an affirmative obligation to develop the issues raised by them. Furthermore, the court found that this obligation had been disregarded by the Commission and its hearing examiner, which had displayed an "impatience" and a "hostility" toward the efforts of the public interest intervenors.<sup>424</sup> Castigating the treatment of viewer interests as an example of "administrative conduct [erroneous] . . . beyond repair," the court took the unusual step of ordering that the license renewal be vacated and that a fresh license application proceeding be commenced.<sup>425</sup> While rarely expressed in such sharp terms, the requirement that agencies give adequate consideration to all affected interests, and in particular, the interests of the intended beneficiaries of an administrative scheme, has been utilized by the courts with increasing frequency to redress perceived agency favoritism to organized interests.<sup>426</sup>

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<sup>421</sup> In remanding to the Commission, the court directed further agency consideration of interconnected power supplies, underground transmission lines, and the "entire fisheries question," as well as gas turbines. See 354 F.2d at 620-25.

<sup>422</sup> The court asserted that the Commission had an affirmative duty to consider all relevant alternatives and their impact on the "public interest":

[The Commission's] role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.

354 F.2d at 620.

<sup>423</sup> *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969).

<sup>424</sup> *Id.* at 547-48.

<sup>425</sup> *Id.* at 550.

<sup>426</sup> See, e.g., *Citizens' Committee to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974); *Air Line Pilots Ass'n, Int'l v. CAB*, 475 F.2d 900, 905 (D.C. Cir. 1973); *Wellford v. Ruckelshaus*, 439 F.2d 598 (D.C. Cir. 1971). Courts have sought to achieve the same goal by enforcing the *Scenic Hudson* requirement that all alternatives be given due consideration. See *Pillai v. CAB*, 485 F.2d 1018 (D.C. Cir. 1973) (setting aside CAB-approved international fares on the ground that Board failed to consider the "open rate" alternative). The "adequate consideration" requirement is sometimes phrased as an agency obligation to take a "hard look" at relevant issues and alternatives. See, e.g., *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

The obligation of agency consideration of alternate policy choices in light of their impact on all affected interests finds its apotheosis in judicial implementation of the National Environmental Policy Act. The statute requires that proposals for "major federal actions significantly affecting the quality of the human environment" be accompanied by a "detailed statement . . . on . . . the environmental impact of the proposed action."<sup>427</sup> As construed in a leading decision:<sup>428</sup>

[The requirements of the Act seek] to ensure that each agency decision maker has before him and takes into account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance . . . .

The interests to be considered in this balancing process are not limited to those concerned with the natural environment, but include those relevant to the quality of human life generally.<sup>429</sup> In addition, the requirement of adequate consideration has been strictly construed to protect comparatively ill-organized interests, in order to counterbalance a perceived agency tendency to favor organized client or regulated interests.<sup>430</sup> Doubtless the NEPA decisions approach an extreme limit, but they make explicit a model of decision implicit in the developing theory of administrative law. Restraining governmental power within statutory bounds and securing a minimum of formal justice no longer suffice as tests of validity in agency conduct. The pluralist diagnosis of bias in discretionary agency policy choices requires that administrators also take into account each of the wide variety of relevant interests differentially affected by possible policy alternatives.

Under this diagnosis, the problem of administrative procedure is to provide representation for all affected interests; the problem of substantive policy is to reach equitable accommodations among these interests in varying circumstances; and the problem of judicial review is to ensure that agencies provide fair procedures for representation and reach fair accommodations. These difficulties are ultimately attributable to the disintegration of any

<sup>427</sup> National Environmental Policy Act of 1969 § 102(2)(C), 42 U.S.C. § 4332 (2)(C) (1970).

<sup>428</sup> Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

<sup>429</sup> Thus, for example, the social effects of a prison facility on a neighborhood or community must be addressed in an impact statement. *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973); *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir. 1972), *cert. denied*, 409 U.S. 990 (1972).

<sup>430</sup> *See, e.g., Conservation Soc'y of S. Ver. v. Secretary of Transp.*, 508 F.2d 927 (2d Cir. 1974); *Green City Planning Bd. v. FPC*, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972).

fixed and simple boundary between private ordering and collective authority. The extension of government administration into so many areas formerly left to private determination has outstripped the capacities of traditional political and judicial machinery to control and legitimate its exercise. In the absence of authoritative directives from the legislature, decisional processes have become decentralized and agency policy has become in large degree a function of bargaining and exchange with and among the competing private interests whom the agency is supposed to rule. Private ordering has been swallowed up by government, while government has become in part a species of private ordering. Where the governmental and private spheres are thus melded, administrative law must devise a process, distinct from either traditional political or judicial models, that both reconciles the competing private interests at stake and justifies the ultimately coercive exercise of governmental authority. The notion of adequate consideration of all affected interests is one ideal of such a process. Whether judicial resources and machinery can realize that ideal is the question that must next be addressed.

#### IV. ADMINISTRATIVE LAW AS INTEREST REPRESENTATION

The expansion of the traditional model to afford participation rights in the process of agency decision and judicial review to a wide variety of affected interests must ultimately rest on the premise that such procedural changes will be an effective and workable means of assuring improved agency decisions. Advocates of extended access believe that an enlarged system of formal proceedings can, by securing adequate consideration of the interests of all affected persons, yield outcomes that better serve society as a whole. The credibility of this belief must now be considered.

Although the courts have displayed caution in expanding and reworking administrative law doctrine to ensure the representation of all affected interests, the thrust of decisions over the past decade supports the assessment of the Court of Appeals for the District of Columbia Circuit that: "In recent years, the concept that public participation in decisions which involve the public interest is not only valuable but indispensable has gained increasing support."<sup>431</sup> The principle of interest group representation in

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<sup>431</sup> *Office of Communication of the United Church of Christ v. FCC*, 465 F.2d 519, 527 (D.C. Cir. 1972). While a substantial number of the essential decisions in the transformation of administrative law have come out of the Court of Appeals for the District of Columbia Circuit, *see, e.g., id.*, the expansion of the traditional

agency adjudication has been warmly endorsed by commentators<sup>432</sup> and by the Administrative Conference of the United States.<sup>433</sup> Such participation, it is claimed, will not only improve the quality of agency decisions and make them more responsive to the needs of the various participating interests,<sup>434</sup> but is valuable in itself because it gives citizens a sense of involvement in the process of government,<sup>435</sup> and increases confidence in the fairness of government decisions.<sup>436</sup> Indeed, litigation on behalf of widely-shared "public" interests is explicitly defended as a substitute political process that enables the "citizen to cast a different kind of vote, [which] informs the court that . . . a particular point of view is being ignored or underestimated" by the agency.<sup>437</sup> Its ultimate aim is seen as "a basic reordering of governmental institutions so that access and influence may be had by all."<sup>438</sup>

Not only is the expansion of participation rights applauded, but it is urged that resources be made available to facilitate the representation of otherwise unrepresented interests by private attorneys and by governmental agencies such as a proposed federal consumer advocate agency.<sup>439</sup> Such proposals follow logically from the premise that justice results when all interests are considered.<sup>440</sup>

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model of administrative law has been by no means the exclusive province of a small group of judges or of one particular court.

<sup>432</sup> See, e.g., J. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* (1971); Gellhorn, *supra* note 66.

<sup>433</sup> ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1971-72 REPORT 11-12, 37-38 (1972) (calling for adoption of a variety of mechanisms to facilitate public interest representation as a counterweight to the influence of organized interests).

<sup>434</sup> See Bonfield, *supra* note 72, at 511-12.

<sup>435</sup> See McLachlan, *Democratizing the Administrative Process: Toward Increased Responsiveness*, 13 ARIZ. L. REV. 835, 851 (1971). See also Boyer, *supra* note 79, at 148; Gellhorn, *supra* note 66, at 361; Jaffe, *supra* note 361, at 1044.

<sup>436</sup> See Gellhorn, *supra* note 66, at 361; Note, *AEC Rulemaking and Public Participation*, 62 GEO. L.J. 1737, 1737 & n.1 (1974).

<sup>437</sup> Comment, *The Role of the Judiciary in the Confrontation with the Problems of Environmental Quality*, 17 U.C.L.A.L. REV. 1070, 1099 (1970). How bewildered would be the Founders to hear the courtroom touted as the cockpit of democracy!

<sup>438</sup> Sheldon, *Public Interest Law: A Step Toward Social Balance*, 13 ARIZ. L. REV. 818, 819 (1971).

<sup>439</sup> See, e.g., Lazarus & Onek, *supra* note 210, at 1097-1104. There have been proposals for the creation of federal agencies to represent the interests of the poor in rulemaking. See, e.g., Bonfield, *supra* note 72, at 530-45; ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, *supra* note 433, at 21-22. Similar proposals have been made to create an advocate agency to represent consumers in formal proceedings conducted by administrative agencies and to seek judicial review of administrative decisions. See, e.g., 7 NAT'L J. REP. 453 (1975). An advocate agency for users of utilities' services has also been proposed. See H.R. 1569, 93d Cong., 1st Sess. (1973).

<sup>440</sup> This premise is the foundation of what has been termed the "due process"

The time has come for a critical assessment of this prescription for asserted biases and inadequacies in agency decisions. The judges' incipient transformation of administrative law into a scheme of interest representation is responding to powerful needs that have been neglected by other branches of government.<sup>441</sup> There are serious perceived inadequacies in agency performance, and this perception must be addressed if attitudes towards government are not to degenerate into cynicism or despair. Moreover, the realities of agency performance may often indeed be far short of what is desirable or even tolerable. But whether a judicially implemented system of interest representation is an adequate or workable response to these needs is a question deserving the most careful consideration.

#### A. *The Provision of Representation*

The threshold problems in assuring representation of all affected interests in the process of administrative decision are determining which interests are to be represented and the means by which such representation is to be provided. The limitations imposed by the developing law of standing and intervention on the potential interests entitled to be represented are, in practice, relatively insubstantial. The requirement of "injury in fact" may in theory limit standing to interests whose stake in the controversy is other than solely ideological, but a litigant satisfying the requirement of injury to material interests is usually available even if his motivation or that of those shouldering the litigation is primarily ideological.<sup>442</sup> To the extent that it has continued vitality, the additional requirement that would-be plaintiffs be within the zone of interests to be protected or regulated by the relevant statute often becomes in practice a question of whether the statute betrays a congressional intent to exclude a particular class of plaintiffs from judicial review.<sup>443</sup> While courts may be responsive to pleas to limit the extent of litigation rights enjoyed by participants in agency proceedings in order to serve expedition and efficiency, agencies will rarely be able to

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version of the public interest. See Schubert, *Is There a Public Interest Theory?*, in NOMOS V: THE PUBLIC INTEREST 162-76 (Friedrich ed. 1962).

<sup>441</sup> See generally Lazarus & Onek, *supra* note 210. See also Friendly, *Judicial Control of Discretionary Administrative Action*, 23 J. LEGAL ED. 63, 69 (1970) ("experience . . . teaches that the degree to which the courts can be expected to restrain themselves is a function of what other branches of government do to avoid the need for [judicial] interposition . . .").

<sup>442</sup> See, e.g., *United States v. SCRAP*, 412 U.S. 669 (1973).

<sup>443</sup> See *Barlow v. Collins*, 397 U.S. 159, 167-68 (1970) (Brennan, J., concurring); Scott, *supra* note 274, at 662-66.

exclude indirectly affected interests from such proceedings altogether.<sup>444</sup> Thus the practical extent of standing and participation rights turns on the means for providing representation to the multitude of interests affected by agency decisions, rather than on doctrinal limits to access rights.

Broad participation rights do not, by any means, ensure that all relevant interests will be represented before the agencies. Representation of these interests is especially unlikely in what may be a frequent situation in administrative law — where the impact of a decision is widely diffused so that no single individual is harmed sufficiently to have an incentive to undertake litigation, and where high transaction costs and the collective nature of the benefit sought preclude a joint litigating effort, even though the aggregate stake of the affected individuals would justify it.<sup>445</sup> “Public interest” advocacy is aimed at providing representation for such widely scattered interests.<sup>446</sup> Today, such advocacy is undertaken primarily by the private bar through “public interest” law firms funded primarily by foundations, or by private firms who subsidize pro bono work out of their regular business.<sup>447</sup> In addition, there are some membership organizations, particularly in the environmental field, that retain lawyers at less than going market rates, although they too are often dependent on foundation support.<sup>448</sup> In a few important instances the government has provided “public interest” representation before administrative agencies: for example the representation of the interest in competition by the Justice Department Antitrust Division; the representation of poor persons’ interests through the Office of Economic Opportunity; and the representation of the interests of consumers of transportation services by the Department of Transportation.<sup>449</sup>

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<sup>444</sup> See Gellhorn, *supra* note 66, at 376–88; Note, *supra* note 328, at 740–46; p. 1774 *infra*.

<sup>445</sup> See p. 1686 *supra*; OLSON, *supra* note 81, at 33–36.

<sup>446</sup> See Heineman, Book Review, 84 YALE L.J. 182, 183 (1974).

<sup>447</sup> See, e.g., *id.*; AMERICAN BAR ASS’N, SECT. ON INDIV. RIGHTS AND RESPONSIBILITIES, PRO BONO REPORTS (1971–1974); Note, *Structuring The Public Service Efforts of Private Law Firms*, 84 HARV. L. REV. 410 (1970); Note, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970); 3 CLASS ACTION REPS. 163–68 (1974) (list of “public interest” law firms in Washington, D.C.).

<sup>448</sup> Examples include the Environmental Defense Fund, The National Resources Defense Council, and the American Civil Liberties Union. Community organizations and even political parties have also engaged in litigation on behalf of their constituents. See, e.g., *Black United Front v. Washington Metropolitan Area Transit Comm’n*, 436 F.2d 233 (D.C. Cir. 1970) (rate increase for bus service challenged by Black United Front and the District of Columbia Democratic Committee).

<sup>449</sup> See Breyer, *supra* note 200.

"Public interest" advocates, however, do not represent — and do not claim to represent — the interests of the community as a whole. Rather they espouse the position of important, widely-shared (and hence "public") interests that assertedly have not heretofore received adequate representation in the process of agency decision.<sup>450</sup> Such representation is wholly consonant with the pluralist vision of the collective welfare implicit in the expansion of the traditional model, but there remain questions as to whether a public interest advocate truly represents the interest for which he purports to speak and, ultimately, how that interest is to be defined. Public interest lawyers, who are responsible for much of the recent litigation that has transformed the traditional model, are to be commended for their efforts to improve the administrative process, but reliance on expanded public interest advocacy as a solution to the problem of agency discretion<sup>451</sup> raises a number of troubling issues.

First, problems are raised because the resources presently available for private representation of fragmented "public" interests fall woefully short of those necessary to ensure adequate representation of all those interests significantly affected by agency decisions.<sup>452</sup> Even where representation is provided, resources are so thin that counsel must limit their efforts to controversies of pervasive importance. Where, as here, the avowed purpose of representation is the essentially political end of shaping governmental policy in a direction more responsive to all affected interests,<sup>453</sup> this scarcity of legal services assumes a special significance. At present, the decision as to which "public" interests will enjoy representation before the agency rests primarily with the private attorneys and the foundations that provide the funding for such representation.<sup>454</sup> This procedure for selecting the interests that will receive representation is unsatisfactory because it contravenes the rationale for expanded participation rights by giving private individuals the discretion to determine which interests will be favored in agency decisionmaking.<sup>455</sup>

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<sup>450</sup> See Lazarus & Onek, *supra* note 439, at 1077.

<sup>451</sup> See generally S. LAZARUS, *THE GENTEEL POPULISTS* (1974).

<sup>452</sup> See Heineman, *supra* note 446, at 188.

<sup>453</sup> See pp. 1713-15, 1760-61 *supra*. Given this purpose, it is hardly surprising that the tax exempt status of non-profit organizations engaging in public interest litigation should be questioned. See, e.g., STAFF OF SENATE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, *LAW AND THE ENVIRONMENT, SELECTED MATERIALS ON TAX EXEMPT STATUS AND PUBLIC INTEREST LITIGATION*, 91st Cong., 2d Sess. (Comm. Print 1970).

<sup>454</sup> See generally Cahn & Cahn, *Power to the People or the Profession? The Public Interest in Public Interest Law*, 79 *YALE L.J.* 1005 (1970).

<sup>455</sup> Compare Hazard, *Law Reforming in the Anti-Poverty Effort*, 37 *U. CHI. L. REV.* 242 (1970). By the same token, lawyers who represent powerful industrial



The fact that public interest lawyers often select the interest to be represented points to another difficulty. The lawyer is often not subject to any mechanism of accountability to ensure his loyalty to the scattered individuals whose interests he purports to represent.<sup>456</sup> Where a lawyer is retained by a business firm to represent it in administrative proceedings, the position dictated by its interests is often reasonably well defined, or is worked out through a process of consultation between lawyer and client.<sup>457</sup> But the interests to be represented in a large unorganized class of persons<sup>458</sup> are not readily identifiable, and may be conflicting. The public interest lawyer must decide what sub-class of interests to represent — for example, the consumer's interest in lower price versus his interest in a safer product. Since there is no ready mechanism for establishing what is the preponderant interest of the class, there is a danger — especially acute in the context of settlement<sup>459</sup> — that the lawyer will not advocate the interests

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interests might be accused — as they have been — of assuming a similar responsibility for the content of government policy. See generally M. GREEN, *THE OTHER GOVERNMENT* (1975).

<sup>456</sup> See Cahn & Cahn, *supra* note 454; Brill, *Uses and Abuses of Legal Assistance*, 31 *PUB. INT.* 38 (1973).

Responsible public interest lawyers have asserted that they should represent defined interest group constituencies and that they "must be accountable to the public constituencies which they represent." Lazarus & Onek, *supra* note 439, at 1097. No concrete program for ensuring such accountability has, however, been forthcoming. To assert that the lawyer should simply strive to advance the interests of the particular individuals named as litigants would be inconsistent with the rationale of public interest litigation — the representation of an unorganized class of individuals — because there is no a priori assurance that the self-defined interests of a single member of the class would be representative of the class as a whole.

In view of these problems, some defenders of public interest litigation have viewed the public interest litigant as a freewheeling ombudsman or political scourge. See, e.g., McLachlan, *supra* note 435, at 854.

<sup>457</sup> However, the lawyer representing a large corporation may often face serious difficulties in defining the interest to be represented because of ambiguities in the definition of the corporation's long run interests and because of the potentially conflicting aims of corporate officials.

<sup>458</sup> See, e.g., *Federation of Homemakers v. Butz*, 466 F.2d 462 (D.C. Cir. 1972) (class of consumers of particular food products); *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970) (class of persons potentially endangered by use of DDT).

<sup>459</sup> Whenever representation is undertaken on behalf of an unorganized class, there is a danger that settlements will be reached simply to get the lawyer a fee. See note 354 *supra*. Proposals have already been advanced to deal with the potential threat of "public interest" strike suits. See Rotunda, *The Public Interest Appellant: Limitations on the Right of Competent Parties to Settle Litigation Out of Court*, 66 *NW. U. L. REV.* 199, 221 (1971).

Settlements may also be a means of siphoning off "side payments" for those

of the broad constituency supposedly represented, but rather his own interests or those of a few active members of that constituency.<sup>460</sup>

In political representation we employ regular elections in the expectation that they will ensure that the representative is responsive to the interests of those whom he represents, but no analogous mechanism of accountability appears feasible in the case of the public interest lawyer. This difficulty may well be endemic, for the efforts that would be involved in identifying the individual preferences of class members would reintroduce many of the

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members of the represented group that are actively interested in the litigation. For example, there are obvious potential conflicts of interest between persons challenging the renewal of broadcast licenses on the ground of discriminatory programming and the broader class represented, where litigation is settled with a provision that the station hire those plaintiffs actively involved in the litigation as program consultants. See, e.g., Settlement Agreement between McGraw-Hill, Inc. and Colorado Citizens Committee for Broadcasting, et al., Cases 72-1308-11 & 72-1315 (D.C. Cir. 1973) (on file with the author). See also LAZARUS, *supra* note 451, at 161; Comment, *supra* note 328, at 767, 768. Even where the settlement is directed at policy outcomes, the bargaining chips held by the lawyer and actively interested plaintiffs may in fact be used to advance the interests of one sub-group over another rather than for the benefit of the entire class.

The nature of public interest representation and the ill-defined and shifting interests involved may preclude the development of reasonably objective standards for administrative or judicial policing of the adequacy and fairness of negotiated settlements. See Scott, *supra* note 274, at 681. However, in *Office of Communication of the United Church of Christ v. FCC*, 465 F.2d 519 (D.C. Cir. 1972) [*Church of Christ III*], the court set aside an FCC rule prohibiting any reimbursement of petitioners' expenses in the settlement of petitions to deny the renewal of broadcast licenses. The court suggested that settlements be scrutinized to ensure that the challenge was made in good faith and had substantial merit, that the settlement produced substantial benefits, and that any expenses reimbursed were "legitimate and prudent." *Id.* at 528. While such standards may eliminate the cruder forms of strike suits, they may not obviate the danger of more subtle forms of "side payments," and appear ineffective to deal with the problem of whether the litigant fairly represented the views of the class purportedly represented.

<sup>460</sup> See Cahn & Cahn, *supra* note 454, at 1040-42; Comment, *supra* note 328, at 733. The lawyers' professional concerns may also conflict with the interests of those represented. For example, the lawyers for plaintiff in *Sierra Club* conspicuously refused to allege injury to Club members utilizing the Mineral King Valley and instead insisted on attempting to secure standing for the Club as an ideological plaintiff. Presumably this strategy reflected a desire to win a landmark case that would ease the lawyers' task in future litigation by obviating the necessity of locating Club members suffering ascertainable injury from the conduct challenged. But this quite risky strategy seems to have been at odds with the members' presumed desire to prevent development of Mineral King. Even were it possible later to amend the complaint to allege injury to members after losing on the ideological plaintiff strategy, the initial loss might well have deprived the Club of a preliminary injunction against development of the Valley and thus diminished the chances of preventing it altogether.

crippling transaction costs which public interest representation is designed to circumvent.<sup>461</sup>

These difficulties are only somewhat alleviated where the plaintiffs represented are an organization and its members. The organization will have a leadership to whom the lawyer must in some degree account,<sup>462</sup> and the leadership is presumed to be responsive to the membership,<sup>463</sup> but often such organizations purport to represent, and are perceived as representing, a far broader class of individuals than their own members.<sup>464</sup> There are no accepted means of determining whether the views of the organization are congruent with the interests of the broader class.

Given the considerable discretion and independence enjoyed by public interest advocates, we must regard with scepticism claims that a scheme of interest representation will relieve "citizen" frustration and apathy toward government and serve to legitimate agency policies.<sup>465</sup> Most individual members of the class of interests assertedly represented will probably be completely unaware of the "participation" in their behalf. Alternatively, such individuals may see no tangible connection between their interests and the litigation, or they may feel that their putative advocate is ignoring their real needs or actually working against them. Whatever vicarious participation they may enjoy is a far remove from the model of Athenian democracy which underlies much of the rhetoric of public interest representation.<sup>466</sup>

These difficulties would not be obviated by agencies' using appropriations to finance litigation expenses for deserving public interest litigants appearing before them,<sup>467</sup> or by judicial de-

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<sup>461</sup> Public interest representation should ideally duplicate the representation that would be afforded if transactions (including arrangements to overcome the free-rider effect) were costless. But we are a long way from this ideal. It may be impossible to posit a person's interests apart from some procedure for eliciting preferences, such as market choices, voting choices, opinion polls, etc.

<sup>462</sup> *But see* Brill, *supra* note 456.

<sup>463</sup> Members disgruntled with the organization's position will presumably take steps to change its policies or leave the organization. *See* HIRSCHMANN, *supra* note 355.

<sup>464</sup> *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970).

<sup>465</sup> *See* p. 1761 *supra*.

<sup>466</sup> However, scepticism about the relationship between public interest attorneys and the interest group members should not be pressed too far. The degree of widespread financial support for organizations engaged in public interest litigation, such as environmental organizations, probably cannot be attributed to calculations of material self-interest. Rather such support may provide a vicarious sense of participation in the political process (nurtured by regular newsletters from the organization) that is valued for its own sake. *See* Miller, *Common Causes's Growing Muscle*, *Wall Street Journal*, April 10, 1974, at 16, col. 4.

<sup>467</sup> A number of commentators have suggested such public financing schemes.

crees that such expenses be financed by other litigants.<sup>468</sup> The lawyer, foundation, or other organization promoting the litigation and carrying its expenses will continue to have prime discretion in selecting and defining the interest represented; the difficulties attending such discretion will therefore remain. Moreover, those who advocate agency or court award of litigation expenses agree that reimbursement should not be automatic, lest such practices become an open-ended scheme of lawyers' relief. But the suggested standards for making awards are vague — for example, where the litigant has "materially assisted the agency in making an informed decision,"<sup>469</sup> or protected "vital statutory interests"<sup>470</sup> — and their application to particular facts has occasioned sharp controversy.<sup>471</sup> Accordingly, proposals for the award of litigation expenses would simply add another discretionary step to present arrangements for public interest representation, and there is no evidence to indicate that courts<sup>472</sup> or agencies<sup>473</sup> have

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*See, e.g.,* Lazarus & Onek, *supra* note 439, at 1100-01; Gellhorn, *supra* note 66, at 396; Note, *Federal Agency Assistance to Impecunious Intervenors*, 88 HARV. L. REV. 1815 (1975). *But see* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, *supra* note 433, at 60 (Recommendation 28 and Separate Statements of Messrs. Paglin, Briggs, and Russell) (rejecting recommendation that agencies be encouraged to experiment with various techniques for subsidizing the litigation expenses of public interest litigants).

<sup>468</sup> *See, e.g.,* Gellhorn, *supra* note 66, at 396; Lazarus & Onek, *supra* note 439, at 1100-01. Courts have recently awarded litigation expenses to public interest litigants as "private attorneys general" where the court has found that such litigation advanced important congressional purposes. *See* Wilderness Society v. Morton, 495 F.2d 1026 (D.C. Cir. 1974) (en banc), *rev'd sub nom.* Alyeska Pipeline Service Co. v. Wilderness Society, 43 U.S.L.W. 4561 (U.S. May 12, 1975); *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974). *Contra* Sierra Club v. Lynn, 502 F.2d 43, 64-66 (5th Cir. 1974), *modifying* 364 F. Supp. 834 (W.D. Tex. 1973). The award of litigation expenses under this theory is designed, as in public interest litigation generally, to circumvent the transaction costs that would otherwise preclude representation of widely shared but unorganized interests. *Wilderness Society, supra* at 1030; *La Raza Unida, supra* at 98. However, the Supreme Court in *Alyeska Pipeline* held that federal courts lacked power to make fee awards on such a theory unless such power was granted by statute, or the basis of jurisdiction is diversity and such an award would be available under relevant state law.

<sup>469</sup> Gellhorn, *supra* note 66, at 397.

<sup>470</sup> *Wilderness Society v. Morton*, 495 F.2d 1026, 1032 (D.C. Cir. 1974) (en banc), *rev'd sub nom.* *Alyeska Pipeline Service Co. v. Wilderness Society*, 43 U.S.L.W. 4561 (U.S. May 12, 1975).

<sup>471</sup> *See id.* (5-4 decision, strong dissents).

<sup>472</sup> Under the "vital statutory interest" test announced in *Wilderness Society v. Morton*, 495 F.2d 1026 (D.C. Cir. 1974) (en banc), *rev'd sub nom.* *Alyeska Pipeline Service Co. v. Wilderness Society*, 43 U.S.L.W. 4561 (U.S. May 12, 1975), the right to attorneys' fees might be as broad as the right to participate in agency proceedings, since participation rights are usually premised on strong congressional policies favoring representation of a wide spectrum of interests. *See, e.g.,* Scenic

suitable criteria for exercising or policing such discretion. These difficulties were a substantial factor in *Alyeska Pipeline Service Co. v. Wilderness Society*<sup>474</sup> where the Supreme Court ruled that federal courts do not enjoy a general discretionary power to award attorneys' fees to public interest litigants on a finding that the litigation has advanced important statutory purposes.<sup>475</sup>

Similar difficulties arise with proposed government advocate agencies. Although the broad categories of interests to be represented would be designated by the legislature rather than by private individuals, the legislature may ignore or purposely exclude important interest groups in establishing such agencies.<sup>476</sup> Moreover, it is unrealistic to assume homogeneity or identity of interest among the groups protected by a particular statutory scheme.<sup>477</sup>

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*Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). An attempt to define limiting principles to such broad rights to compensation for litigation expenses might degenerate into little more than subjective, ad hoc decisionmaking for which judicially manageable standards appear unavailable. See *Alyeska Pipeline Service Co. v. Wilderness Society*, 43 U.S.L.W. 4561, 4567-68 (U.S. May 12, 1975); Scott, *supra* note 274, at 681. See also Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849 (1975).

One way in which these problems might be avoided would be for the legislature to specify the controversies in which the award of litigation expenses would be appropriate. See Clean Air Act Amendments of 1970, 42 U.S.C. § 1857h-2(d) (1970) (providing for the award of litigation expenses including reasonable attorneys' fees at the court's discretion). See also *Natural Resources Defense Council v. EPA*, 484 F.2d 1331 (1st Cir. 1973) (award of litigation expenses in suits to challenge the EPA Administrator's failure to discharge statutory duties).

<sup>473</sup> Proposals that agencies be vested with substantial discretion to award litigation expenses are subject to the same difficulties mentioned in connection with awards by courts, and seem inconsistent with the central rationale for providing public interest representation, which is to correct perceived bias in agency policy against unorganized "public" interests.

<sup>474</sup> 43 U.S.L.W. 4561 (U.S. May 12, 1975).

<sup>475</sup> See *id.* at 4568-69.

<sup>476</sup> Understandably, the most actively considered proposals for the creation of new advocate agencies concern widely held interests with political appeal, such as the needs of consumers. Less popular interests — for example, opponents of practices asserted to violate the Establishment Clause of the Constitution — are unlikely to command the political support required to establish a new agency. Moreover, every creation of a new advocate agency increases the chance of inter-cene litigation between such agencies, a spectre which creates a politically appealing argument against the creation of still further advocate agencies.

<sup>477</sup> For example, in arguing for the creation of an advocate agency to represent the interests of the poor, Bonfield defines the "poor" as "that group in our society unable to represent adequately its collective interest in federal rulemaking because its members lack the individual or organizational financial resources to do so." Bonfield, *supra* note 72, at 521. But such a definition would appear to include many environmental and consumer interests shared by persons who are personally well-to-do but whose individual stake is small. The goals of those seeking to advance such interests might often conflict with the goals of persons with low income.

The government advocate must therefore confront the recurring problem of choosing which among several conflicting sets of interests to represent. As with the largely self-appointed public interest advocates from the private bar, there appears to be no ready mechanism for resolving such choice problems or for evaluating the adequacy or fidelity of the representation. These conflicts cannot be dismissed as academic simply because there are immediate tasks for advocate agencies on which most would agree; the history of administrative agencies suggests that such conflicts will become increasingly significant as time erodes the agency's initial political mandate, and that the same forces which have led to agency favoritism toward organized interests could in time produce a similar bias on the part of advocate agencies.<sup>478</sup>

### B. *The Costs of Interest Representation*

The resort to formal procedures and judicial review to effectuate a more equal representation of interests affected by administrative decisions is likely to entail serious costs both in resources and in possible impairment of the quality of such decisions. Formal rights of participation have immediate significance only to the extent that agency policy must be implemented through formal proceedings.<sup>479</sup> Because bias in agency policies is often attributed to informal decisions, courts have imposed requirements that force agencies to adopt formal procedures for hitherto informal decisions.<sup>480</sup> To the extent that trial-type procedures are required, with the right of participants to introduce evidence and to cross-examine, a considerable measure of delay and increased expenditure of resources will be involved. These characteristics will be aggravated with the expansion of the number of parties entitled to participate.<sup>481</sup> Liberalized grants of stand-

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<sup>478</sup> See S. LAZARUS, *supra* note 451, at 197-98. The success of the Antitrust Division of the Justice Department in resisting such corrosive pressures may be attributable to a sustaining faith by its professional staff in an essentially ideological principle of free competition. It may not be possible or desirable to install a comparable faith in other ideologies in other advocate agencies. Moreover, the rather rigid position of the Antitrust Division may weaken the effectiveness of its efforts to persuade regulatory agencies to modify their policies in favor of greater competition.

<sup>479</sup> See p. 1752 *supra*.

<sup>480</sup> See pp. 1752-55 *supra*.

<sup>481</sup> For example, over 35 parties, including governmental authorities, conservation, recreation, and environmental associations, and various individuals have participated in the *Scenic Hudson* litigation thus far. See Consolidated Edison Co., Inc., Project No. 2338, 44 F.P.C. 350, 352-53 (1970). See also Panel II, *Standing, Participation and Who Pays*, 26 AD. L. REV. 423, 445 (1974) (remarks of H. Russell).

ing to seek judicial review will promote further delay and require additional commitments of resources.

Unorganized interests, by threatening to invoke new rights to demand formal decisionmaking procedures and judicial review, may enjoy a measure of derivative bargaining power in informal agency procedures because of the ability thus to impose the high costs of litigation and delay on agencies and other affected groups.<sup>482</sup> Nonetheless, those representing unorganized public interests may, for a variety of reasons, prefer to require that agency decisions be subject to formal proceedings:

*First.* — For an initial and perhaps protracted period of time, the advocates for newly represented interests will wish to utilize formal proceedings and judicial review if only to make credible their derivative power in the informal process.

*Second.* — Unorganized interests may remain at a considerable disadvantage in the informal processes of agency decisionmaking because their comparative lack of cohesion and financial resources prevents them from having as effective representation as organized concerns. It may therefore be to the advantage of unorganized interests to force administrative decisionmaking into the formal mode, even if their chances of ultimately prevailing are slim. The delay costs that can be imposed on opponents by resort to formal proceedings present tactical advantages that lawyers are unlikely to forego.<sup>483</sup>

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<sup>482</sup> This informal bargaining power will be greatest in those situations where those invoking formal proceedings are opposed to a suggested course of action which will be delayed pending the completion of formal proceedings. *See, e.g.,* *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966), *after remand*, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972), *after petition for reconsideration*, 498 F.2d 827 (2d Cir. 1974). The threat of delay and increased litigation costs will not, obviously, be as helpful to those seeking affirmative action as it may be to those seeking to block a proposed course of action. Moreover, the credibility of the threat will also be a function of the resources of the parties involved.

<sup>483</sup> *See, e.g.,* B. SCHWARTZ & H. WADE, *supra* note 325, at 124 (discussing a concerted effort by welfare recipients to demand hearing rights in order to paralyze the agency and win concessions on substantive policies, and quoting a manual that instructs recipients of public assistance that demands for a "fair hearing" cause administrators to "look at your complaint very carefully because it costs money to give you a 'fair hearing.'") Although some commentators have argued that public interest advocates will probably not utilize procedural devices to gain tactical advantages from delay, *see, e.g.,* Gellhorn, *supra* note 66, at 384, this argument seems totally inconsistent with all we know about advocacy, including that by public interest representatives. Boyer, *supra* note 79, at 167; Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 595 (1972). Particularly where agency decision is viewed as foreordained, "public interest" representatives may "resort to the tactic of delay rather than plotting a strategy for victory." *Id.* However, invocation of formal proceedings

*Third.* — “Public interest” lawyers representing unorganized interests may have a marked personal preference for formal processes of decision, including judicial review, because a considerable portion of the psychological reward which they receive for their work may depend on the high visibility of their efforts, and because dramatic court victories may assist fund-raising efforts.<sup>484</sup>

*Fourth.* — As the process of choice involves multiple parties and becomes more complexly polycentric, it becomes increasingly likely that at least one of the parties will eventually demand formal agency proceedings or judicial review because of the increased difficulties in securing a stable compromise between all parties.

The resource and delay costs of formal proceedings are incurred by the agency as well as private parties<sup>485</sup> and may seriously undermine the effective discharge of agency responsibilities.<sup>486</sup> These burdens will mount as previously informal decisions on enforcement policies are subjected to formal processes of resolution. Increased procedural formalities may work to the disadvantage of public interest groups by exhausting their limited resources and providing organized interests a basis for delaying agency enforcement actions. Moreover, formal trial-type proceedings in many contexts may be inferior to informal negotiations as a means of agency dispute resolution and decision-

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may not always work to the advantage of public interest representatives. Large, organized interest groups may find it advantageous to demand expensive formal proceedings in order to exhaust the more limited resources of public interest representatives.

<sup>484</sup> Judge Friendly has remarked on the penchant of some public interest lawyers to litigate cases that “would readily yield to settlement if the lawyer was not more intent on scoring a point, almost invariably claimed to be of high constitutional magnitude, rather than in getting a prompt solution for his clients.” Friendly, *Forward* to B. SCHWARTZ & H. WADE, *supra* note 325, at xx. See also Brill, *supra* note 456.

<sup>485</sup> The indirect costs of delay in agency proceedings may also fall on the general public. See Friendly, *Forward* to B. SCHWARTZ & H. WADE, *supra* note 325, at xvii (commenting on the effects of the delays in *Scenic Hudson* on the availability and cost of electric power to New York City consumers).

<sup>486</sup> See Comment, *supra* note 328, at 793-94, 796. It has been argued that agency resources are committed once the decision to commence formal proceedings has been made, and therefore that permitting public interest intervention will not substantially add to the burdens which the agency has already incurred. See Gellhorn, *supra* note 66, at 381. This argument appears unrealistic, however, since such intervention is likely to reduce agency discretion as to the conduct and possible settlement of the litigation, and will add to its complexity and length. Ironically, advocates of expanded public interest representation castigate “regulatory delay” as one of the chief evils of the administrative process, without squarely addressing the incentive for public interest advocates to generate additional delay by utilizing new procedural rights. See, e.g., Johnson, *supra* note 216, at 889-90.



making. The complex scientific, technological, social and economic issues presented in so much of current administration are often ill-suited for resolution by adjudicatory procedures that produce gargantuan records whose size "varies inversely with [their] usefulness."<sup>487</sup> Judicialization of agency procedures and the expansion of participation rights may also aggravate the tendency for the agency to assume a passive role,<sup>488</sup> focusing on the unique character of each controversy in order to reach an ad hoc accommodation of the particular constellation of interests presented.<sup>489</sup>

Courts have discounted the various costs inherent in the expansion of the traditional model to extend formal rights of representation to a broad range of affected interests by pointing to the economic barriers to the effective assertion of such rights.<sup>490</sup> While it may be realistic to acknowledge the economic disincentives to interest group representation, the courts' argument is disquieting. Since the theory of "public interest" representation is that it will produce more equitable results and should for its own sake be valued as a means of popular participation in government, the right to such representation should be more than ceremonial doctrine. The contrast between expansive participation rights in theory and limited public interest representation in practice is likely to generate demands for new measures to ensure adequate funding for public interest representation in agency proceedings.

Commentators who have supported various proposals for funding in order to facilitate such representation have acknowledged the resource and delay costs that could result if broadened participation rights were effectively exercised, but have suggested that such costs could be reduced by increased use of rulemaking pro-

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<sup>487</sup> Friendly, *Foreword* to B. SCHWARTZ & H. WADE, *supra* note 325, at xvii. See also Boyer, *supra* note 79 and authorities there discussed; Cramton, *supra* note 483, at 586; Fuller, *Mediation, Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971).

<sup>488</sup> See R. NOLL, REFORMING REGULATION: AN EVALUATION OF THE ASH COUNCIL PROPOSALS 23-27 (1971).

<sup>489</sup> See Boyer, *supra* note 79, at 144; Williams, *An Evaluation of Public Participation*, 24 AD. L. REV. 49, 60-61 (1972). See also *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966), 425 F.2d 543 (1969). The courts have extended participation rights to a wide range of affected interests, but simultaneously have insisted that the agency's obligation goes beyond giving adequate consideration to issues raised by the parties, requiring that agencies seek out and evaluate other alternatives, thus imposing potentially inconsistent responsibilities on the agency. See *id.*

<sup>490</sup> See, e.g., *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1006 (D.C. Cir. 1966); *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608, 617 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

cedures<sup>491</sup> and by limiting the number of parties entitled to participate in agency adjudications<sup>492</sup> or seek judicial review.<sup>493</sup> However efforts to streamline adjudicatory procedures may be to a large extent unavailing since the exclusion of any distinct interest that has a substantial stake in the outcome of an agency action would seem inconsistent with the theory underlying the expansion of the traditional model of administrative law. Even when several representatives purport to speak for a given class of individuals, such as consumers, members of the class may have different conceptions of that interest which should each be presented to the decisionmaker if all affected interests are to be represented adequately.<sup>494</sup> Selection among these various interest representatives will be necessary if the costs of administrative proceedings are to be minimized, but there appear to be no workable criteria upon which a principled choice among interest representatives can be based.<sup>495</sup>

In addition, there may be scant scope for modifying procedures to reduce the delays and resource costs of formal agency adjudications. Although cross-examination is the most expensive and potentially the most wasteful of all the procedural safeguards associated with trial-type hearings, public interest litigants with limited resources may legitimately regard it as the most valuable technique for challenging their opponents' positions and establishing their own.<sup>496</sup> Furthermore, reliance on administrative law judges to "exclude irrelevant or unduly repetitious evidence"<sup>497</sup> is, in practice, wishful thinking because the safest course is normally to allow all questions and admit all arguably relevant evidence. Given the rigor with which courts often enforce the requirement that agencies consider all relevant alternatives and

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<sup>491</sup> See notes 501-02 *infra*.

<sup>492</sup> See, e.g., Gellhorn, *supra* note 66, at 378-79.

<sup>493</sup> See, e.g., L. Jaffe, *supra* note 2, at 486-94.

<sup>494</sup> See, e.g., Hudson River Fishermen's Ass'n v. FPC, 498 F.2d 827 (2d Cir. 1974) (relief granted to fishermen representatives but not environmentalists generally).

<sup>495</sup> See Scott, *supra* note 274, at 681. Advocates of public interest representation have not to date advanced operational standards for identifying the potentially best public interest representatives. See Gellhorn, *supra* note 66, at 382; Comment, *supra* note 328, at 744-45.

<sup>496</sup> See, e.g., Boyer, *supra* note 79, at 128-29. See also Comment, *supra* note 328, at 734-44.

<sup>497</sup> Note, *Intervention by Third Parties In Federal Administrative Proceedings*, 42 NOTRE DAME LAYER 71, 75 (1966). However, courts have sustained agency regulations imposing threshold requirements, such as advance specification of contentions, on potential participants in agency proceedings where such regulations are reasonably calculated to promote procedural efficiency. See, e.g., *Business and Professional People for the Public Interest v. AEC*, 502 F.2d 424 (D.C. Cir. 1974).

all relevant affected interests — including the interests of persons not party to the proceedings<sup>498</sup> — it may likewise be unrealistic to suggest that an agency can avoid lengthy proceedings by “tailor[ing] any hearing it grants” to issues and evidence specified in advance.<sup>499</sup> So long as formal participation rights remain at the heart of the pluralist solution to the problem of agency discretion, the possibilities for streamlining multi-party adjudicatory proceedings on complex issues are distinctly limited.

Nor is more extensive use of notice and comment<sup>500</sup> rulemaking an especially promising means of providing for effective representation of all affected interests without an excessive commitment of resources. Although notice and comment rulemaking has been termed the “most democratic of procedures” because all may participate,<sup>501</sup> and has been urged as an alternative to multi-party adjudication,<sup>502</sup> public interest advocates have tended to scorn resort to rulemaking proceedings on the ground that participation in such proceedings may have little impact on agency policy determinations. In notice and comment rulemaking the agency is not bound by the comments filed with it, and many such comments may be ignored or given short shrift.<sup>503</sup> Indeed, the content of rulemaking decisions is often largely determined in advance through a process of informal consultation in which organized interests may enjoy a preponderant influence. Providing *Federal Register* notice and an opportunity for affected interests to file comments on proposed regulations may therefore

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<sup>498</sup> See pp. 1757-59 *supra*. See also Pillai v. CAB, 485 F.2d 1018 (D.C. Cir. 1973); REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES OF THE COMMITTEE ON LICENSES AND AUTHORIZATIONS IN SUPPORT OF RECOMMENDATION No. 15 (1970).

<sup>499</sup> Fuchs, *Introduction: Administrative Agencies and the Energy Problem*, 47 IND. L.J. 606, 616 (1972).

<sup>500</sup> In notice and comment rulemaking, the agency publishes a notice of proposed action in the *Federal Register* and permits participation by interested persons, normally through submission of written comments, but is not obliged to reach a decision solely on the basis of the comments submitted. By contrast, in on the record rulemaking, there is a trial-type hearing in which parties to the proceeding enjoy litigation rights, such as cross-examination, and the decision must be based solely on the evidence in the resulting record. See 5 U.S.C. § 553(b), (c) (Supp. III 1974).

<sup>501</sup> See DAVIS, *supra* note 25, at 66.

<sup>502</sup> See Gellhorn, *supra* note 66, at 378-79; Hanes, *Citizen Participation and Its Impact Upon Prompt and Responsible Administrative Action*, 24 S.W.L.J. 731 (1970).

<sup>503</sup> The writer recalls a visit to the offices of a major federal agency to inspect comments submitted in a major rulemaking proceeding. The bound presentations of regulated firms and a few well-heeled public interest litigants were in frequent use; a large heap of other comments, generally ill-informed, from the citizenry at large had been dumped in a corner and ignored.

be of little value, because initial policy decisions have often been made already, and because proposed regulations rarely undergo major revision before final adoption.<sup>504</sup> Additionally, there may be no effective means for courts to require agencies to give greater weight to the views of public interest advocates in rulemaking proceedings since the scope of judicial review has traditionally been narrow.<sup>505</sup> Because of these factors — which have largely been ignored by those endorsing rulemaking as a means of ensuring adequate consideration of diverse interests<sup>506</sup> — increased reliance on rulemaking may do little to shift the balance of influence on agency policy in favor of unorganized “public” interests.

### C. *The Indeterminacy of Interest Representation*

The difficulties and costs of furthering the representation of all affected interests through formal proceedings might be thought tolerable if such representation substantially improved the quality and fairness (however those terms may be defined) of the resulting decisions. But the impact of such representation on agency decision is at best problematic.

Representation of unorganized interests may have some impact on administrators' decisions by providing additional inputs of data and argument, and by calling attention to aspects of

<sup>504</sup> See Schotland, *supra* note 394, at 266–67, which attacks agencies' practice of “putting all the action” into the informal phase of rulemaking. The practice is an old one. See LEISERSON, *supra* note 222, at 93.

<sup>505</sup> See Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970). While there are recent indications of more vigorous judicial scrutiny of rulemaking decisions, e.g., *Kennecott Copper Corp. v. EPA*, 462 F.2d 846 (D.C. Cir. 1972), the potential saving of resources through use of rulemaking has been undercut by developing limitations on the extent to which agencies can substitute rulemaking for trial-type procedures where agency policy choices affecting important private interests turn on disputed facts. See, e.g., *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973); *Appalachian Power Co. v. EPA*, 477 F.2d 495 (4th Cir. 1973); Boyer, *supra* note 79, at 111–13.

<sup>506</sup> See, e.g., Ashman, *Representation for the Poor in State Rulemaking*, 24 VAND. L. REV. 1 (1970); Bonfield, *supra* note 72.

The deficiencies in relying on non-adjudicatory proceedings to reshape agency policies are even more evident in the case of legislative-type “public hearings,” which have also been urged as a means of providing “citizen participation” without undue cost. See B. SCHWARTZ & H. WADE, *supra* note 325, at 139–40; Cramton, *supra* note 483, at 597–98. Public interest litigants have reacted sharply against proposals that might deprive them of procedural rights which afford meaningful leverage over agency decisions. Thus one noted environmental attorney denounced proposals for “legislative” hearings to resolve siting issues as a “fraud” that “accomplished nothing.” See Barfield, *Energy Report/Congress Weighs Major Shift in Reactor Licensing Procedures*, 6 NAT'L J. REP. 647 (1974). See also Comment, *supra* note 328, at 843 (asserting that proposals for “collaborative” decisional processes may lead to a “return to captive regulation”).

particular problems that might otherwise be overlooked. Additionally, the possibility that the representatives of such interests may force the institution of lengthy formal proceedings may deter administrators from obviously illegal courses of action<sup>507</sup> and provide an incentive for administrators to pay greater deference to such interests in exercising their discretion. But agencies will continue to be exposed to intensive pressures from regulated or client groups, on whom the agencies must rely for information, political support, and other forms of cooperation if the agency is to survive and prosper.<sup>508</sup> Efforts to secure greater participation rights cannot eliminate these pressures or change the institutional factors that make for agency dependence on such groups.

Accordingly, the expansion of participation rights at the agency level is unlikely to resolve the fundamental problem of asserted bias in agency choice under broad legislative delegations. By multiplying the range of interests that must be considered, by underscoring the complexity of the issues involved, and by developing a more complete record of alternatives and competing considerations, expanded participation rights may reduce the extent to which procedures will effectively control agency discretion in decisionmaking.<sup>509</sup> Indeed, by emphasizing the polycentric character of controversies, expanded representation may decrease their tractability to general rules and exacerbate the ad hoc, discretionary character of their resolution.<sup>510</sup>

These difficulties are illustrated in the *Scenic Hudson* litigation. In the past, FPC licensing decisions on power projects had in most cases been a matter between the Commission and the applicant, and had focused largely on engineering and financial considerations.<sup>511</sup> In *Scenic Hudson*, however, litigants documented the project's potential adverse effects on the interests of consumers, municipalities, fishermen, and environmental and conservation groups, and challenged the utility's claims of cost and engineering efficiency, pointing to alternative means of providing increased electricity supplies to New York City. On review of the Commission's order granting a license, the Second Circuit found that the Commission had failed to take all of the potentially affected interests and possible alternative policies into account. It remanded

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<sup>507</sup> However, the delay in securing judicial review may still lead an agency to take what is pretty clearly an unlawful course if short term political and administrative considerations are sufficiently compelling. See, e.g., *Natural Resources Defense Council v. EPA*, 475 F.2d 968 (D.C. Cir. 1973).

<sup>508</sup> See pp. 1685-86 *supra*.

<sup>509</sup> See Friendly, *Foreword* to B. SCHWARTZ & H. WADE, *supra* note 325, at xvii; Boyer, *supra* note 79, at 112.

<sup>510</sup> See pp. 1756-57, 1772-73 *supra*.

<sup>511</sup> See, e.g., *Idaho Power Co.*, 14 F.P.C. 71 (1958).

the controversy for further agency proceedings, enjoining the Commission to give due regard to alternative power sources,<sup>512</sup> and to possible project design modifications that might minimize adverse effects on the various affected interests.

In thus expanding the scope of the agency's inquiry, the court effectively reinforced the discretionary nature of the choices involved and the impossibility of deciding them by general rules. This consequence is most evident in the court's treatment of the cost savings of the proposed project as a fund which might be used to offset the adverse effects of the project.<sup>513</sup> Should such funds be utilized to carry transmission lines underground? To install expensive fish preservation devices? To bury the unsightly pumping and generating facilities? In what proportion? Should electricity consumers recover these savings through lower rates? How are these issues — which differ little from those presented in decisions on highway siting, air fare structures, pesticide tolerances, or a host of other matters — to be resolved in a principled way through adjudicatory procedures?<sup>514</sup> However such issues are resolved in the context of a given project, that resolution is likely to be of limited significance for other projects with a different complex of issues and effects.<sup>515</sup> The participation of a wide variety of affected interests has effectively transformed the shape and nature of controversy from a bipolar conflict potentially susceptible of resolution by recurrent application of

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<sup>512</sup> The agency was directed to consider such alternative sources as: gas turbine generators; relocation of the pumped storage facility; construction of additional fossil fuel plants; better integration with regional grid facilities; and purchase of additional power from Canada. See *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608, 622 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).

<sup>513</sup> The court, in discussing possible project modifications that might reduce adverse environmental effects, stressed testimony by Consolidated Edison witnesses that indicated that the project would result in annual savings of \$12 million over a steam plant of equivalent capacity. See 354 F.2d at 623.

<sup>514</sup> In *Scenic Hudson*, the Commission on remand approved the project with modifications. Various environmental groups again sought judicial review, but the court concluded that the Commission had adequately considered alternatives and refused to set aside its action. *Scenic Hudson Preservation Conf. v. FPC*, 453 F.2d 463 (2d Cir. 1971), cert. denied, 407 U.S. 926 (1972). The only apparent alternative open to the court was once again to remand for further proceedings, creating serious additional costs and delays. However, this disposition did not deter environmental and other groups from again initiating litigation in an effort to halt the project, on the ground that all previous proceedings had overlooked the fact of tidal flow in the Hudson at the project site, thus greatly increasing the potential damage to fish. *Hudson River Fishermen's Ass'n v. FPC*, 498 F.2d 827 (2d Cir. 1974).

<sup>515</sup> See Schwartz, *Comparative Television and the Chancellor's Foot*, 47 GEO. L.J. 655 (1959) (analyzing the lack of reasoned consistency in the FCC's multivariate approach to the comparative qualifications of competing applicants for broadcasting licenses).

rules to an unruly field of shifting forces that may defy regular ordering.<sup>516</sup>

The ideal of rational decision assertedly consists in the best resolution and harmonization of conflicting interests,<sup>517</sup> but since there is generally no agreed-upon criterion of what constitutes a "best solution,"<sup>518</sup> decisionmaking will normally be a question of preferring some interests to others.<sup>519</sup> After even the most attentive consideration of the contending affected interests, there is still the inescapable question of the weight to be accorded to each interest and the values invoked in its support. Statutory directives will generally be of little assistance in assigning weights to the various affected interests, since the problem of broad agency discretion generally grows out of a legislative inability or unwillingness to strike a definitive balance among competing values and interest groups.<sup>520</sup>

<sup>516</sup> The various conflicting interests implicated in agency policy decisions, such as those involved in the licensing decision in *Scenic Hudson*, were present even where the only parties were the license applicant and the Commission staff. Such conflicts were informally resolved by the Commission or ignored, and so long as the Commission and the licensee resolved their differences, they were not exposed to judicial review. The effect of broadened participation rights has been to force the resolution of such issues into an adjudicatory mold and pave the way for more searching judicial scrutiny of the resulting decision. See Gellhorn, *supra* note 66, at 381 (criticizing the "artificial two-sidedness" of traditional proceedings).

<sup>517</sup> See Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227, 1234-35 (1966); Note, *Democratizing the Administrative Process: Toward Increased Responsiveness*, 13 ARIZ. L. REV. 835, 843 (1971).

<sup>518</sup> Expanded interest representation has also been defended as ensuring more accurate resolution of factual issues. See, e.g., Johnson, *A New Fidelity to the Regulatory Ideal*, 59 GEO. L.J. 869, 875-76 (1971), but as *Scenic Hudson* illustrates, the most difficult issues are rarely ones of disputed fact. *Scenic Hudson* also demonstrates that expanded public interest participation in adjudicatory procedures is no guarantee that relevant issues will be exposed and thoroughly analyzed. See *Hudson River Fishermen's Ass'n v. FPC*, 498 F.2d 824 (2d Cir. 1974) (tidal flow in Hudson at project site, which greatly increases potential danger to fish life, not discovered until after 10 years of agency and court proceedings).

<sup>519</sup> Even if one accepted the principle that legal institutions as a whole should be conceived with a view toward maximizing aggregate welfare, this principle may be of limited assistance in the context of uncoordinated, decentralized administrative decisions which may have consequences beyond the administrator's power to control or correct. For example, courts or agencies dealing with pollution may face the dilemma of either permitting pollution to continue or shutting down polluting industries, causing economic dislocations that they are powerless to correct. See, e.g., *United States v. Reserve Mining Co.*, 380 F.Supp. 11 (D. Minn.), *stay of injunction granted*, 498 F.2d 1073 (8th Cir.), *aff'd*, 95 S. Ct. 287 (1974). From a society-wide viewpoint the optimal solution may be to shut down polluting industries and provide governmental funds to ease the resulting dislocation, but the responsible agency may often lack the authority to provide such funds, as will the reviewing court. See Michelman, Book Review, 80 YALE L.J. 642, 680-83 (1971).

<sup>520</sup> For example, the relevant statute in *Scenic Hudson* was the Federal Power

The prognosis that procedural requirements may be largely ineffective in controlling agency tendencies to favor organized interests where the record does not focus decision, and where the weighting of key variables is left unresolved, is confirmed by the subsequent history of the *Scenic Hudson* litigation and by experience under the National Environmental Policy Act (NEPA).<sup>521</sup> In *Scenic Hudson*, the FPC held lengthy hearings following remand and ultimately approved the proposed power project, but with only comparatively minor modifications; despite the initial judicial disapproval of a similar plan, this subsequent order was upheld on review.<sup>522</sup> In interpreting NEPA, courts have similarly used the principle of "adequate consideration," developed in pre-NEPA decisions such as *Scenic Hudson*, to require agencies to consider the environmental (and other) effects of all reasonable alternatives to a given proposal—including total abandonment—in order to ensure that "the most intelligent, optimally beneficial decision will ultimately be made."<sup>523</sup> The results of this endeavor, however, have generally proven disillusioning to environmentalists.<sup>524</sup> The Act's requirements have afforded a handhold for judicial suspension (and, in some cases, elimination) of a small proportion of projects, and have had prophylactic value in shunting off a number of egregious proposals at the agency level.<sup>525</sup> But one is left with the impression<sup>526</sup> that NEPA has not deterred agencies from following their bent in most cases after going through the motions of devising an impact statement.<sup>527</sup>

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Act § 10(a), 16 U.S.C. § 803(a) (1970), which provided that, in order to be approved, projects must "be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development and for other beneficial uses, including recreational purposes."

<sup>521</sup> 83 Stat. 852 (1970), 42 U.S.C. §§ 4321-4347 (1970).

<sup>522</sup> See note 514 *supra*.

<sup>523</sup> *Calvert Cliffs' Coord. Comm., Inc. v. AEC*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

<sup>524</sup> See Sax, *supra* note 160. Some assessments are more mixed, see Anderson, *NEPA and Federal Decision Making*, 3 ENVIR. L. RPT. 50099 (1973), but they may not be representative of the more candid views of environmental advocates, who are reluctant to speak publicly against legislation that has considerable ceremonial significance but whose results have fallen far short of expectations.

<sup>525</sup> See Anderson, *supra* note 524. However the number of such cases appears to be small in comparison to the number of projects for which impact statements have been filed, see UNITED STATES COUNCIL ON ENVIRONMENTAL QUALITY, ANNUAL REP. 388-91 (1974), or should have been filed.

<sup>526</sup> There is a pressing need for rigorous empirical study of the effects on agency decisions of procedural requirements such as those fashioned by the courts on the basis of NEPA.

<sup>527</sup> Many impact statements are written by outside consultants and thus have no cathartic effect whatsoever on agency bureaucrats.



It is perhaps surprising that any different outcome should have been expected. As long as agency discretion to set substantive policy is unconstrained by legislative directives or any other exogenous limits,<sup>528</sup> formal procedures may serve to delineate conflicting claims, but procedures alone cannot resolve them. Although broad statutory delegations have eroded the justifications for the procedural requirements of the traditional model and impaired their effectiveness in controlling outcomes, the contemporary enthusiasm for public interest representation suggests that formal procedures maintain great symbolic power as guarantors of just results.<sup>529</sup> However, where agencies exercise considerable discretion over policy choices, there is no a priori reason to believe that a "more equitable policy" will necessarily "evolve out of an adversary proceeding in which all affected interests [are] effectively represented."<sup>530</sup>

#### D. Substantive Standards for Judicial Review

1. *The Adequate Consideration Requirement.* — The principle of adequate consideration of relevant affected interests presupposes that agencies accord full rights of representation and participation to all such interests.<sup>531</sup> In adjudicatory proceedings, interest representatives should accordingly enjoy the right to submit evidence, arguments and briefs, and to cross-examine adverse witnesses. Since a reviewing court generally will not investigate whether administrators have actually read and considered the

<sup>528</sup> See pp. 1683-84 *supra*.

<sup>529</sup> Charles Reich's observation some eight years ago has even greater force today:

When it is used in areas of policy making, [adjudicatory] procedure serves primarily to preserve the mythology about how government operates. It prevents us from seeing resource allocation as a process by which some are punished and others rewarded for reasons which have no relation to objective merits but have relation only to government policy. It preserves the appearance of the rule of law, making it seem that the immensely important allocation and planning process is being carried out at all times subject to fair and equitable guiding principles.

Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227, 1237 (1966). There are at least three reasons for the preservation of this mythology. First, the efficacy of procedural rules in confining agencies within legislative directives has created an aura of principled potency that has not dissipated as the rules have been bent to new uses. Second, procedural requirements have become the instrument of judicial choice for dealing with agency discretion, and the rhetoric attending their enforcement casts a spell. Third, and related to the first two, procedural requirements may function as a sort of "legal magic" to "end the uneasiness which a man would experience in the presence of disconcerting phenomena, to supply him with grounds for expecting victories over the causes of his fright." J. FRANK, COURTS ON TRIAL 62 (1949). See also Boyer, *supra* note 79, at 148-49.

<sup>530</sup> *Roberts v. Fuquay-Varina Tobacco Bd. of Trade, Inc.*, 405 F.2d 283, 285 (4th Cir. 1968).

<sup>531</sup> See pp. 1748-60 *supra*.

briefs and evidence submitted by each litigant,<sup>532</sup> determining whether agencies have satisfied the "adequate consideration" requirement will involve court scrutiny of the record and of the agency's opinion in order to determine whether each interest representative has been given the opportunity to develop an adequate record and whether all relevant, material arguments have been discussed in the opinion and disposed of in a justifiable manner.<sup>533</sup> Given the diversity and multiplicity of interests that may be represented as a result of increased participation rights, preparation of opinions that demonstrate "adequate consideration" of parties' contentions may impose a heavy burden on the agency (or its opinion writers). Moreover, exhaustive discussion of the parties' contentions may not be adequate to sustain the agency decision, because the court may require the agency on its own motion "to seek out experts representing varied and opposing . . . views."<sup>534</sup> In effect, the "adequate consideration" principle may become a convenient formula for reversing agency decisions which the court finds unpalatable, since it can almost always find some aspect of the controversy that has been overlooked or some contention that arguably has not been given its due.

Moreover, completeness in agency records and opinions alone may not be sufficient; what counts as "adequate consideration" of an issue or interest necessarily turns on the weight or value to be assigned to that issue or interest.<sup>535</sup> Courts applying the adequate consideration principle under NEPA have striven to avoid this problem by requiring agencies to accord "good faith objectivity"<sup>536</sup> and "full good faith consideration"<sup>537</sup> to all relevant factors. But "good faith" in decisionmaking must ultimately

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<sup>532</sup> See *United States v. Morgan*, 313 U.S. 409, 421-22 (1941). *But see* *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-21 (1971); *District of Columbia Federation of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972).

<sup>533</sup> See, e.g., *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (agency must take a "hard look" at all relevant issues and interests); *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608, 617-21 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

<sup>534</sup> *Friends of the Earth v. AEC*, 485 F.2d 1031, 1033 (D.C. Cir. 1973) (opinion of Bazelon, C. J.). See also *Pillai v. CAB*, 485 F.2d 1018 (D.C. Cir. 1973); *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543, 546-49 (D.C. Cir. 1969); *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608, 620-21 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

<sup>535</sup> Reference to the "weight" and "value" to be ascribed relevant interests is symptomatic of the inability to reduce agency decisions to fixed legal rules and the consequent need to resort to a nebulous, ad hoc process of resolution.

<sup>536</sup> *Environmental Defense Fund, Inc. v. Corps of Engineers*, 470 F.2d 289, 296 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973).

<sup>537</sup> *Environmental Defense Fund, Inc. v. Froehle*, 473 F.2d 346, 353 (8th Cir. 1972).

turn in part on the standards of choice applied. Suppose in *Scenic Hudson* that the project as originally proposed would destroy half the fish population of the Hudson River, but that a \$500 modification in the project would eliminate any adverse effect on fish. An agency which did not require the modification could not be said to have given adequate consideration to the project's effect on fish, even if its opinion exhaustively discussed the matter but concluded that the modification was too costly. Our response—something like: “You can't really have considered the effect on fish; anybody who had would have required the modification”—would be premised on a judgment, which we believe is or should be widely held, that the interest in preserving the fish so clearly outweighs the additional \$500 burden on the project beneficiaries that no responsible decisionmaker could fail to require the modification.<sup>538</sup>

Accordingly, in applying the adequate consideration requirement courts must employ some judgment as to the minimum weight to be accorded the relevant affected interests. In the past, this judgment has been expressed and enforced through the “arbitrary and capricious” standard of judicial review<sup>539</sup> which has been utilized quite sparingly by the courts to set aside agency decisions that strike a plainly unreasonable balance among relevant considerations.

Continued judicial reliance on the deferential “arbitrary and capricious” standard would, in all but the most extreme cases, leave the crucial question of the appropriate weight to be assigned to each interest in the hands of the agency. Asserted bias in the agency's weighting of affected interests is, however, the principal problem which a system of interest representation seeks to redress. For judges who accordingly wish to impose stricter limits on agency choice, the “adequate consideration” principle provides an alternative to the arbitrary and capricious standard that is framed in procedural terms and, since the agency on remand makes the ultimate policy decision, does not so conspicuously flaunt discretionary judicial power over policy choices.

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<sup>538</sup> Increasingly, courts have asserted that the listing in impact statements of the effects of a project (and alternatives) on various affected interests does not satisfy the requirements of NEPA if the balance struck among those interests by the agency in its discretion is “arbitrary.” See, e.g., *Calvert Cliffs' Coord. Comm., Inc. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 470 F.2d 289, 297-98 (8th Cir. 1972). However, there has apparently been no reported decision in which a court has invalidated agency action on this ground alone.

<sup>539</sup> Judicial invalidation of arbitrary and capricious agency action can be seen as part and parcel of the court's responsibility to contain agency conduct within the bounds authorized by the legislature. See note 46 *supra*.

This stratagem is not, however, without costs. The reliance on ad hoc judicial interest balancing in the application of the "adequate consideration" requirement will tend to prevent the development of generalized substantive rules as grounds of decision in particular cases. Since it is unlikely that principles or guidelines can be developed for weighing particular interests, agencies attempting to solve complex problems will be largely unable to anticipate what a subsequent reviewing court may demand of them. Even on remand, there is no assurance that the agency's best efforts to redistribute weights among the various interests will satisfy the reviewing court. The resulting oscillation between agency and court may entail enormous delays and impose substantial costs on the litigants, the agency, and the society generally.<sup>540</sup> Since agencies and public interest representatives command only limited resources, such costs may seriously impair the effort to stimulate more effective agency action on behalf of unorganized interests.<sup>541</sup> On the other hand, if courts sought to avoid such costs by declining to remand agency decisions for further proceedings, they would be abandoning the only effective sanction behind the adequate consideration requirement. These dilemmas are illustrated in the second *Scenic Hudson* decision,<sup>542</sup> where following lengthy proceedings before the Commission, the court was faced with the choice of either upholding the Commission's renewed approval (with some modifications) of the Storm King project or remanding for a third round of agency proceedings (creating enormous additional delays and costs). A majority of the court of appeals, apparently believing discretion the better part of valor, sustained the Commission's approval of the project, stating that "[w]here the Commission has considered all relevant factors . . . we will not allow our personal views as to the desirability of the results reached . . . to influence us in our decision."<sup>543</sup>

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<sup>540</sup> For example, it has been 12 years since the pumped storage project involved in *Scenic Hudson* was first proposed to the FPC and the matter is still not resolved. As Judge Friendly has pointed out, see *Foreword* to B. SCHWARTZ & H. WADE, *supra* note 325, at xvii, this delay has entailed substantial costs for the public. See also Note, D.C. Federation of Civic Associations v. Volpe: *Blessing or Burden?*, 27 STAN. L. REV. 125 (1974). It might be worthwhile to incur such costs in a few cases if, as some commentators have suggested, see, e.g., Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 526 (1974), occasional court enforcement of the adequate consideration requirement had a beneficial prophylactic effect on agency decisionmaking generally, but experience suggests that any such effect may be at best modest.

<sup>541</sup> See Panel III, *Decision-Making in Agency Proceedings*, 26 AD. L. REV. 489, 520 (1974) (remarks of R. V. Zener).

<sup>542</sup> 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).

<sup>543</sup> 453 F.2d at 468.

2. *The Overton Park Technique.* — One possible solution to the problem of defining the appropriate weights to be assigned to various competing interests in the processes of agency dispute resolution and policy-making, while at the same time avoiding the hazards of ad hoc judicial intervention, is the approach taken by the Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe*.<sup>544</sup> The Court there set aside a decision by the Secretary of Transportation to approve the construction of a federally funded highway through a city park, strictly construing a somewhat unclear statute as permitting such routing only in exceptional cases where alternative routes were clearly unsuitable. The decision, which emphasized the propensity of planners to route highways through parks, interprets the relevant statute in a manner that effectively requires highway administrators to accord paramount weight to the interest in parkland preservation. Such an approach, which constrains perceived agency biases, facilitates judicial review by narrowing the relevant issues, and provides future guidance for the agency, is clearly preferable to the particularized and largely unstructured judicial scrutiny of the *Scenic Hudson* type.

However, the technique of construing unclear statutes to control agency policy biases may not be feasible or justifiable in more than a small proportion of cases. Given the open-ended quality of many legislative delegations, considerable (and questionable) judicial reconstruction of the statute may be required in order to extract significant, generally applicable constraints on agency discretion.<sup>545</sup> In addition, efforts to constrain agency choice over a broad class of cases may unduly restrict administrative flexibility in future controversies.

Moreover, the very process of enlarging the number of interests represented tends to multiply the issues for decision in a way that diminishes the odds of finding a clear statutory directive to resolve the controversy. Thus in *Scenic Hudson* advocacy by numerous parties representing diverse consumer, environmental, and commercial interests served to dramatize the multiplicity of

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<sup>544</sup> 401 U.S. 402 (1971).

<sup>545</sup> See, e.g., *King v. Smith*, 392 U.S. 309 (1968), which construed the Social Security Act to require participating states to provide assistance to all children deprived of parental support because of the "absence" of a parent, regardless of whether a "substitute parent" lived in the house (thus voiding "man in the house" rules) despite the silence of the statute on the subject and its consistent interpretation to the contrary by the Social Security Administration.

Even in *Overton Park*, it was far from clear in the statutory language and the legislative history that Congress intended to accord paramount weight to the interests of park users at the expense of other groups, such as inner city residents who might be displaced if the highway were built along an alternative route. For a meticulous examination of the relevant legislative history, see D. Goldstein,

conflicting factors involved in the agency's exercise of an extremely broad statutory authority to approve the particular project or to require various modifications such as fish protection devices or underground transmission lines. Even where the applicable statute appears to provide more explicit criteria for choice, the process of interpreting such statutes broadly in order to provide a basis for conferring standing on hitherto unrepresented interest groups may largely destroy its utility as a guideline for agency decisionmaking. For example, in *Citizens Committee for the Hudson Valley v. Volpe*,<sup>546</sup> the court construed a statute prohibiting the construction of dikes in navigable rivers without congressional approval (a provision with the obvious core purpose of preventing navigational hazards) as protecting environmental interests so that standing could be given to environmental groups opposed to construction of a highway along the Hudson River that would assertedly constitute a "dike." As a result, the responsible federal agency, which previously could rely on relatively clear-cut navigational criteria, was required to consider a variety of other ill-defined and potentially competing factors in deciding whether construction projects require congressional approval.

3. *Judicial Interest Balancing.* — If judges are unable or unwilling to construe the relevant statute as providing specific, generally applicable directives, then case-by-case discretion in decisions is inevitable. It might nonetheless be argued that judges are better qualified than administrators to exercise such discretion and to assign the necessary weights to competing interests. Administrators are often subject to pressures from organized interests that threaten to skew choice, whereas the judge is assertedly capable of weighing the affected interests with more impartial detachment. Thus some advocates of public interest representation have forthrightly asserted that it "is the job of the court" to decide "where the public welfare in balance lies."<sup>547</sup> In addition to straining courts' competence to resolve policy questions involving complex scientific and economic issues, such

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The Impact of Parklands on Highways: The Scope and Operation of Section 4(f) of the Department of Transportation Act and Section 138 of the Federal-Aid Highway Act of 1968, A Study in the Legal Process 1-24 (1973) (on file with the author). See also *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 38, 315, 321-23 (1971); Mashaw, *The Legal Structure of Frustration: Alternative Strategies for Public Choice Concerning Federally-Aided Highway Construction*, 122 U. PA. L. REV. 1 (1973) (asserting that *Overton Park* technique not easily applied to other types of highway siting issues).

<sup>546</sup> 425 F.2d 97 (2d Cir. 1970).

<sup>547</sup> Harrison & Jaffe, *Public Interest Law Firms: New Voices for New Constituencies*, 58 A.B.A.J. 459, 466 (1972). But see *Palisades Citizens' Ass'n, Inc. v. CAB*, 420 F.2d 188, 192 (D.C. Cir. 1969) ("The Civil Aeronautics Board has been given the scales of the public interest. It must effect a balance.").

an expansion of judicial power would give the courts a degree of across-the-board responsibility for social and economic policy-making that is wholly inconsistent with our received constitutional premises, under which the legislature remains free, subject to the minimal requirements of the doctrine against delegation of legislative power, to delegate a discretionary power of choice to agencies so long as the agencies stay within statutory bounds and observe appropriate procedural safeguards.<sup>548</sup> The expansion of participation rights to affected interests in itself provides no justification for abandoning these traditional premises. Indeed, the more the question of agency choice comes to resemble a political process of weighing the claims of competing interest groups the less the apparent justification for judicial revision of Congress' delegation of choice to the agency.

4. *The Protection of "Underrepresented" Interests.* — If one recoils from the prospect of a broad judicial discretion to revise administrative judgments regarding the proper weighing of interests, it may be difficult to devise a more limited formula for the exercise of judicial power. Perhaps reviewing courts should give special weight to those interests that are likely to be "underrepresented" in the informal agency process and hence have a lesser impact on the agency's policy decisions.<sup>549</sup> Although some of the leading decisions in the transformation of the traditional model suggest judicial receptivity to such a rationale,<sup>550</sup> there appears to be no adequate principle to define and justify any such general judicial power of revision over agency policies. The reviewing court must have some basis for determining which interests are "overrepresented" and which are "underrepresented" in agency decisions, which implies the existence of some accepted means of defining relevant interests and of ascertaining an initial distribution of weights, in order to determine whether agency decision has been distorted. Even the very concept of interests ascertainable apart from the institutions which define them and

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<sup>548</sup> See *ICC v. Illinois Cent. R.R.*, 215 U.S. 452 (1910); Freund, *The Law of the Administration in America*, 9 POL. SCI. Q. 403, 419 (1894) (asserting that the most serious defect in the traditional model is the failure to provide effective review of discretionary agency action, while rejecting the suggestion that judges should make such discretionary choices).

<sup>549</sup> Such a notion would be the administrative law analogue of the constitutional principle suggested in Justice Stone's celebrated footnote in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Cf. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974) (strict scrutiny in equal protection required where persons allegedly harmed not represented in legislature).

<sup>550</sup> See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).

realize their purposes may be incoherent,<sup>551</sup> and the assumption of an initial distribution of weights begs the question at issue — What is the inherent worth of fish versus scenic beauty versus reliable electric supply?

5. *Judicial "Remand" to the Legislature.* — Another possible solution might be developed from Professor Joseph Sax's proposal that courts set aside all agency decisions that seriously threaten the environment and are not clearly authorized by statute.<sup>552</sup> Specific legislative approval would then be required for such decisions to be carried out. The proposal might be generalized to require invalidation of agency action that seriously harms a relevant interest and is not clearly authorized by statute. Such a proposal would extend the principle of clear statement developed in the context of individual liberties<sup>553</sup> in order to enforce legislative responsibility for resolving group conflicts. It would reflect a view that, as a matter of due process, collective as well as individual interests may be infringed only by explicit mandate of the most representative organ of government.

Implementation of such a policy of clear statement would pose difficulties in defining the classes of interests protected, the degree of invasion required to raise a question of legislative authorization, and the degree of specificity in legislative authorization required to validate the agency's action. More importantly, such a doctrine would threaten to paralyze the administrative process. Given the inevitable breadth of agency discretion, a great many administrative decisions would be struck down. As a result, agencies would be required to petition Congress to approve large numbers of projects. It is unlikely that such petitions would, except in a few cases, lead to legislative formulation of general policy in more specific terms. Rather, most agency decisions might simply be rubber-stamped with the appropriate committee chairmen exercising a sort of "private bill" responsibility.<sup>554</sup> Although

<sup>551</sup> See VILE, *supra* note 36, at 299-302, 332.

While contending that the principle of judicial solicitude for "discrete and insular minorities" in the political process may be useful and valid in the context of racial discrimination, Professor Ely acknowledges three difficulties in applying the principle to minority interests generally. First, "interests" and their alliances often shift in kaleidoscopic fashion. Ely, *supra* note 549, at 729-30, 733-34. Second, quoting Mr. Justice Rehnquist, "[i]t would hardly take extraordinary ingenuity for a lawyer to find 'insular and discrete' minorities at every turn in the road." *Id.* at 729. Third, well organized or strategically situated minority interests may well dominate the political process. *Id.* at 733-34 n.44. These difficulties are likely to become acute if the principle of judicial protection of "underrepresented" interests is to be applied to the diverse and shifting terrain of administrative law.

<sup>552</sup> SAX, *supra* note 432, at 128; see also Note, *supra* note 540, at 141-42.

<sup>553</sup> See pp. 1680-81 *supra*.

<sup>554</sup> See *Road Review League v. Boyd*, 270 F. Supp. 650, 656 (S.D.N.Y. 1967)



it might be theoretically desirable to have a procedure for judicial "remand" of administrative decisions to the Congress, legislative review "on remand" seems unlikely in practice to clarify congressional policies or to provide more effective or responsible control over administrative actions in most cases since the likely volume of decisions to be reviewed would make detailed consideration impossible.<sup>555</sup> At the same time, legislative approval of agency decisions would normally preclude further judicial review of the matter.

*E. Administrative Law as Interest Representation:  
Interim Conclusions*

The foregoing discussion raises serious questions about the transformation of administrative law into a system for assuring the representation of all affected interests in agency proceedings. Such a system involves major difficulties of implementation, is likely to be quite costly, and may lead to the employment of inferior decisional processes.<sup>556</sup> Moreover, the expansion of participation rights to promote interest representation will accentuate the polycentric and unique qualities of each proceeding, rendering it more difficult for agencies or courts to establish rules of decision to govern large numbers of cases. Each decision will tend to be responsive to the particular field of forces represented by the parties, and the attainment of formal justice and realization of its attendant virtues may therefore be gravely impaired.

At the same time, agency solicitude for the interests of regulated or client firms is likely to persist. Since the procedural apparatus of interest representation does not in itself determine policy choices, significant changes in agency policy may require a degree of discretionary judicial control over social and economic decisions that is greater than our traditions would readily counte-

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(routing criticized by environmental groups but highway constructed after informal review by Senate Public Works subcommittee).

<sup>555</sup> The Alaska pipeline controversy may be viewed, depending on one's perspective, as a discouraging rather than hopeful example of judicial "remand" to Congress for fuller consideration of a controversial issue. See *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1034-36 n.6 (D.C. Cir. 1974). See also *Named Individual Members, San Antonio Conservation Soc'y v. Texas Highway Dep't*, 496 F.2d 1017 (5th Cir. 1974), cert. denied, 95 S. Ct. 1123 (1975) (congressional exemption of 6 mile highway segment from NEPA requirements); Mashaw, *supra* note 148, at 50.

<sup>556</sup> For case study of the shortcomings of expanded interest representation in practice, see Note, *Representation of the Public Interest in Michigan Utility Rate Proceedings*, 70 MICH. L. REV. 1367 (1972), which urges improved and expanded agency staff as the only workable means of ensuring more effective regulation. This proposal does not, however, meet the fundamental criticisms levied at agencies' exercise of discretion. See, e.g., Posner, *supra* note 97.

nance. Judicial willingness to exercise such responsibility may be intermittent at best. Many agency decisions are likely to continue to be made on an informal basis, because, as the Supreme Court's decision in *Alyeska Pipeline*<sup>557</sup> suggests, the resources necessary for full realization of the ideal of participation rights for all affected interests are unlikely to be forthcoming. Judicial efforts to redress disparities in interest group resources and to stimulate agency attention to hitherto neglected interests by superimposing a formal system of participation rights<sup>558</sup> are therefore likely to have a quite modest effect on the administrative process as a whole. Perhaps, however, a model of interest representation can be achieved more directly and more effectively by explicitly political mechanisms.

#### V. POLITICAL MODES OF INTEREST REPRESENTATION

Since, in the absence of authoritative rules of decision, the resolution of the conflicting claims of a large number of competing interests is essentially a political process, a solution to the problems raised by the transformation of administrative law into a system of interest representation might better be achieved by a more direct and explicitly political scheme for securing the representation of all relevant interests affected by administrative decisionmaking. Such a mechanism of representation might assume two basic forms: the regular popular election of agency members, or their appointment for specified terms by private organizations designated by Congress. Policy would result from a process of bargaining among the representatives of affected interests. Unlike a judicially developed system of interest representation, where policy is made by non-elected agency officials or judges, the representative process would determine, and presumably legitimate, policy.

While either political model would involve a high degree of decentralization and, perhaps, fragmentation of governmental authority, either might be viewed as simply making explicit a de facto devolution of power and responsibility for the decision of agency policies that has already taken place through the daily push and pull of affected interests. Explicit institutional recognition of such a process may be necessary first step to correction of

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<sup>557</sup> *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 43 U.S.L.W. 4561 (U.S. May 12, 1975).

<sup>558</sup> Efforts to influence agency policy choices by expanding participation rights may be particularly ineffectual where agency favoritism toward regulated or client interests is due to factors other than an imbalance in representation. See pp. 1685-86 *supra*.

perceived inequities in its operation. Moreover, even in an explicitly political scheme of policy formulation, representatives would not enjoy unrestricted discretion, but would be confined within the bounds of legislative directives.

Such proposals may have no real prospect of being adopted in the foreseeable future. But three considerations justify a speculative examination of their implications. First, the costs and hazards implicit in a judicially created scheme of interest representation counsel examination of possibly less burdensome and more efficacious means of achieving the same end. Second, examination of the limitations and defects of representation in a political scheme may illuminate similar difficulties in a judge-made system of representation. Third, examination of the difficulties in both schemes may serve to elucidate important dilemmas in contemporary political and legal theory.

#### *A. Popular Election of Agency Officials*

Popular election of agency officials would serve to legitimate the exercise of legislative powers by administrative officials by invoking the same formal principle that legitimates the exercise of such power by legislators: the principle that the most socially beneficial accommodation of interests will result from a representative regime elected on a one-person, one-vote system.<sup>559</sup> A direct election system would also have the virtue of eliminating the troublesome question of which interests are to be represented and how representatives are to be selected.

In order to facilitate the representation of diverse interests' views, the agencies selected by popular election should have several members.<sup>560</sup> Moreover, a scheme of proportional, rather than geographic, representation would presumably be the most

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<sup>559</sup> In restoring electoral control over the exercise of power delegated by the legislature, the proposal would at least be consistent with the premises underlying decisions such as *Wesberry v. Sanders*, 376 U.S. 1 (1964). However, it is doubtful whether the reasoning of *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), would permit the addition, without a constitutional amendment, of an electoral element to the "independent" commissions, much less to organs discharging traditional executive functions.

<sup>560</sup> A traditional justification for the multimember commission is that it facilitates the representation of diverse viewpoints and moderates the content of agency policy, making it more responsive to a variety of affected interests. See A. LEISERSON, *supra* note 222, at 100-01. But since the President appoints members, normally without any significant statutory limitation on their qualifications or affiliations, and since the Senate accords a considerable measure of deference to the President in confirming appointments, there is no assurance that a diversity of views reflecting the range and importance of affected interests will in fact be achieved in the composition of the agency's membership. See *id.* at 100-15, 270-71.

effective means of ensuring the representation of the greatest number of different economic and social interests with a stake in an agency's policies while keeping the agency's membership within manageable bounds.<sup>561</sup> Such a system of representation could, however, give rise to serious difficulties. In a geographic system of representation, a legislator tends to filter and reconcile the divergent interests within his constituency. In the proposed system of representation, this filtering element would, to a large extent, be absent, and representatives would tend to be perceived as spokesmen for distinct interests. These characteristics would tend to exacerbate conflicts between interests and reduce the likelihood of stable compromise or clear cut resolution of controverted issues of policy. Those stable resolutions that do occur may be the result of consistent subordination of some interests to others. Since the subjects of agency decisionmaking are far more circumscribed than those of the legislature, there are fewer possibilities for log-rolling and other forms of reciprocity<sup>562</sup> and there may be greater potential for confrontation between interests and attempted domination among them.

Furthermore, direct popular election is predicated on some minimal understanding by most voters of how the choices presented relate to their interests. Given the specialized functions of many agencies and the special knowledge required for intelligent appraisal of agency policies, it is most doubtful whether these conditions would be satisfied in a system for popular election of agency members. There might instead be considerable voter apathy; many of those who did vote might be largely ignorant of issues and candidates.<sup>563</sup> While the one-person, one-vote principle may at times afford numerically stronger, but widely scattered and poorly organized, interests an opportunity to counterbalance the advantages of organization and resources, the combination of popular elections and widespread voter apathy might well increase the influence enjoyed by those well organized and well endowed

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<sup>561</sup> An alternative scheme might involve nationwide election of slates or individual representatives on a plurality basis. This proposal might give the major parties an incentive to nominate slates that represented a diversity of interests (along the lines of the "balanced ticket"). To the extent that the timing of elections for agencies coincided with Presidential elections, such a system might promote the election of agency members of the same party as the President, making for a degree of de facto Presidential leadership that would partially offset the decentralization of governmental authority. However, such a development might also impair the representation of diverse interests by the agency's members.

<sup>562</sup> See L. FROMAN, *THE CONGRESSIONAL PROCESS* 22-33 (1967); Stewart, *supra* note 125, at 161-63.

<sup>563</sup> See S. LAZARUS, *supra* note 459, at 51-52 (experience with community action programs).

interests with the most immediate and tangible stake in agency decisions.<sup>564</sup>

A more hopeful prognosis is possible. Elections might direct public attention to the fact of agency responsibility for major policy decisions and stimulate public debate over those decisions. Such developments could bring in their train more informed public scrutiny and control over agency policies, either through the electoral process or through alternatives that might develop out of it. However, historical experience with similar electoral schemes affords little ground for such optimism. For example, many states at one time or another during the late Nineteenth Century provided for popular election of railroad commission members<sup>565</sup> in an effort to offset asserted railroad domination of appointed commissioners.<sup>566</sup> As a result, incompetent commissioners were often selected,<sup>567</sup> and in some cases the railroads acquired an even greater measure of control over commission policies.<sup>568</sup> In nearly all these states popular election was abandoned for a return to the appointed commissions.<sup>569</sup>

### B. Selection of Agency Officials by Interest Groups

The selection of agency members by designated organizations representing diverse interests would tend to ensure a better informed and more active "electorate" than popular election. Those selected could serve as authoritative spokesmen for the in-

<sup>564</sup> See Dickinson, *Democratic Realities and Democratic Dogma*, 24 AM. POL. SCI. REV. 283, 290-91 (1930):

[I]t seems paradoxically true that the more efforts are made to elicit and given effect to the will of the people, the more power is placed in the hands of special groups and interests. . . . The central insight which emerges . . . [is] that, after all, the larger number of members of any political society have no opinion, and hence no will, on nearly all the matters on which government acts.

<sup>565</sup> For a partial listing see Clark, *State Railroad Commissions and How They May Be Made Effective*, 6 AM. ECON. ASS'N 473, Appendix A, Table I (1891).

<sup>566</sup> See DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 1878-1879, at 567-68 (E. Willis & P. Stockton, Official Stenographers 1890) (remarks of Mr. White); *id.* at 593-94 (remarks of Mr. Hager); *id.* at 595-96 (remarks of Mr. Howard).

<sup>567</sup> See F. DIXON, *STATE RAILROAD CONTROL* 204-06 (1896).

<sup>568</sup> See *id.* at 205; C. SWISHER, *MOTIVATION AND POLITICAL TECHNIQUE IN THE CALIFORNIA CONSTITUTIONAL CONVENTION 1878-79*, at 112-13 (1930).

<sup>569</sup> California, for example, ended popular election in 1911. *CONSTITUTION OF THE STATE OF CALIFORNIA AND SUMMARY OF AMENDMENTS* 146-49 (1915). But the Iowa State Commerce Commission remained popularly elected until 1959, see [1888] Iowa Laws, ch. 29, amended by 58 G. A. Iowa, ch. 319 (1959), codified in 26 IOWA CODE ANN. § 474.2 (Supp. 1974), and the Public Service Commissions of Mississippi and North Dakota remain popularly elected to this day. See N.D. CONST. art. 1, § 82; 6 MISS. CODE ANN. § 23-5-93 (1972). See also R. CUSHMAN, *supra* note 29, at 485.

terests represented, and the distribution of representation among various interests would be determined in advance, thus obviating some of the uncertainties and hazards of an electoral system. The selection by Congress of the various interests to be represented by designating established groups — such as trade associations, consumer groups, labor unions, and environmental associations — to choose individual agency members might not be viewed as a radical step in view of past congressional imposition of occupational and geographical qualifications on agency membership<sup>570</sup> and the de facto delegation of substantial governmental powers to private organizations.<sup>571</sup> The character and number of representatives could be adjusted by the legislature from time to time in light of resulting agency policies and the demands of various groups for new or expanded representation. The possibility of legislative change in the basis of representation, as well as changes in policy directives to the agency,<sup>572</sup> might generate a greater degree of public debate and concern over agency policies and might also encourage a greater degree of responsible legislative oversight of agency performance.

Nonetheless, a scheme of direct interest representation does present a number of serious difficulties. The first lies in determining the criteria by which the legislature will identify the interests to be represented, the degree of representation to which each interest is entitled, and the means for selecting the individual representatives. This problem is not unique to this particular form of interest representation; it must be faced in a judicially created scheme as well.<sup>573</sup> However, a legislature that is in-

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<sup>570</sup> See R. CUSHMAN, *supra* note 29, at 159, 164 (Federal Reserve Board); *id.* at 302 (Federal Radio Commission); *id.* at 384 (Bituminous Coal Commission). See generally A. LEISERSON, *supra* note 222, at 110-20. However, it may be far easier as a political matter to designate general occupational qualifications for agency membership (which may not significantly restrain the President's ability to appoint agency members with views congenial to his own) than to specify particular private organizations to share in governmental powers. *But see* note 574 *infra*.

<sup>571</sup> See Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 214-221, 249-253 (1937); G. MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* (1966).

<sup>572</sup> It is an intriguing question whether a system of interest representation might induce the Congress to expand or contract the degree of discretion delegated to agencies. The same question might be asked of a system of popular election, with quite different answers. Certainly it could not be assumed that a specialized agency constituted on either basis would duplicate the decisions of a general purpose legislature with a geographical basis of election. Whether such duplication is desirable raises issues that deserve serious exploration. See pp. 1806 & note 605, *infra*; E. FREUND, *supra* note 10, at 221.

<sup>573</sup> See pp. 1763-70 *supra*. At least one commentator who finds promise in the judicial expansion of formal participation rights has questioned the soundness of a political system of interest representation. See Boyer, *supra* note 79, at 166:

When one moves beyond purely economic regulation to issues such as safety

capable of reaching agreement on controversial issues of substantive policy may also be unable to agree upon the identity and relative voting power of the interest groups to whom such policy choices might be delegated.<sup>574</sup>

A political system of direct interest representation could also raise additional problems. Although the legislature could change the composition of a particular agency in order to adapt to changing conditions, it is likely that, in practice, once the agency has been established the forces of legislative inertia may operate to exclude newly-emerging and unorganized concerns.<sup>575</sup> Such a system might also tend to produce sharp conflict among the various interest group representatives and lead to deadlock in the decision-making process.<sup>576</sup> If representatives instead cooperate with their colleagues in order to advance the work of the agency, they risk repudiation by the organizations responsible for their selection. Also, interest groups may prefer to remain free to criticize agency policies rather than be saddled with a measure of responsibility for agency policy.<sup>577</sup> Such responsibility may also be resisted

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or environmental impact, it makes little sense to use a tripartite committee composed of representatives from labor, management, and the public; the affected interests may well be so indeterminate and shifting that it will prove impossible to discern them in the absence of a particular issue. And within definable categories, such as 'labor,' there may be conflicting constituencies — for example, organized and unorganized labor, skilled and unskilled workers, and blue- and white-collar groups — who can make inconsistent claims on the right to have their interests represented. Finally what account should be taken of the intensity of the represented constituencies' concerns?

These same questions must, however, also be asked and answered under a judicially-developed system of interest representation.

<sup>574</sup> There is, however, limited experience suggesting that where Congress is unable to agree on specific policy directives, it is sometimes able to provide a role for interest group participation in the administrative development of policy with a view to restricting the agency's discretion. See Borhardt, *Congressional Use of Administrative Organization and Procedure for Policy Making Purposes: Six Case Studies and Some Conclusions*, 30 GEO. WASH. L. REV. 429 (1962).

<sup>575</sup> See A. LEISERSON, *supra* note 222, at 8-10; WOLFF, *supra* note 81, at 150-51.

By contrast, the judicially-created system of interest representation may facilitate participation by newly emergent interests. However ill-organized, such groups need only be injured by agency policies, show that they are "arguably within the zone of interests" regulated or protected by the governing statute, and secure a lawyer. See pp. 1731, 1762-63 *infra*; Jaffe, *supra* note 361.

However, in a political system of representation a scheme of membership incentives might be devised to stimulate the emergence of new spokesmen for new groups of interests. Analogies may be found in the "pass through" voting provisions of § 8c(12) of the Agricultural Marketing Act of 1937, 7 U.S.C. § 608c(12) (1970) (agricultural association may cast votes in referendum equal to the number of its individual members), and in proposals for a voucher system to subsidize "public interest" lobbying. See Note, *The Poor and the Political Process, Equal Access to Lobbying*, 6 HARV. J. LEGIS. 369 (1969).

<sup>576</sup> See A. LEISERSON, *supra* note 222, at 176-77.

<sup>577</sup> See *id.* at 132, 135-48, 168; R. CONNERY, *THE ADMINISTRATION OF AN N.R.A. CODE* 35-36 (1938).

because it may generate demands for governmental control of such organizations' membership selection and governance.<sup>578</sup>

Two further and somewhat contradictory objections grow out of the explicit assumption of governmental powers by private interest groups. On the one hand, the direct involvement of interest groups in governmental policymaking may lead to their eventual absorption by central authority.<sup>579</sup> On the other hand, delegated governmental powers may be utilized by private groups to dominate competing private interests.<sup>580</sup> Experience with the New Deal's system of industrial self-management under the National Industrial Recovery Act seems to substantiate the latter of these objections. Under the Act, the activities of specific industries were to be regulated by codes which in theory represented a balance of the interests of employers, labor, and consumers. In practice, however, the codes were proposed by the largest employers and then were modified through a process of negotiation with organized labor interests. Since NRA consumer advisory boards did not represent any well-organized interests, and did not enjoy any significant formal power, their influence on this bargaining process and on resulting policies was minimal in comparison to that of business and labor interests.<sup>581</sup>

The experience under New Deal programs may, however, be

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<sup>578</sup> See T. JENKINS, REACTION OF MAJOR GROUPS TO POSITIVE GOVERNMENT IN THE UNITED STATES 1930-1940, at 381 (1945). Compare M. OLSON, *supra* note 81, at 66-97.

<sup>579</sup> The principle of interest representation has fallen into disrepute in the United States and Great Britain, in part because of a tendency to associate it with fascist corporate state programs. In theory, corporate syndicalism involved a devolution of governmental power to representatives of business and labor through a system of industrial self-government. In practice it became a means of subordinating those interests to centrally dictated governmental policies. See C. FIELD, THE SYNDICAL AND CORPORATE INSTITUTIONS OF ITALIAN FASCISM (1938); J. MEENAN, THE ITALIAN CORPORATIVE SYSTEM (1944).

<sup>580</sup> J. FAIRLIE, ADMINISTRATIVE PROCEDURE IN CONNECTION WITH STATUTORY RULES AND ORDERS IN GREAT BRITAIN 74-75 (1927); A. LEISEN, *supra* note 122, at 107-09.

<sup>581</sup> See L. LYON, P. HOMAN, L. LOUVIN, G. TERBORGH, C. DEARING & L. MARSHALL, THE NATIONAL RECOVERY ADMINISTRATION 124-29 (1935). While the Recovery Administration was supposed to exercise a general superintendency over the process of negotiation and to promulgate the codes, the absence of specific statutory directives, the plenitude of delegation, the limited time within which codes were to be prepared, and above all the apparent need to raise wages and limit production, undermined the Administration's ability to ensure that the interests of consumers and other unorganized groups were fully reflected in the content of codes. See generally R. CONNERY, *supra* note 577; E. HERRING, TRADE ADMINISTRATION AND THE PUBLIC INTEREST 244-46 (1936); S. WHITNEY, TRADE ASSOCIATIONS AND INDUSTRIAL CONTROL (1934). See also Nelson, *Representation of the Consumer Interest in the Federal Government*, 6 LAW & CONTEMP. PROB. 151 (1939); R. BAKER, THE NATIONAL BITUMINOUS COAL COMMISSION 221-53 (1941).



of little relevance to the system of direct interest representation discussed here, which is directed at limited areas of administration and does not involve any general devolution of governmental power.<sup>582</sup> Under this system, the legislature would bear explicit responsibility for the basis of representation, and unorganized private interests, such as consumer groups, would have full voting rights in agency policy formation. Such voting power would presumably generate a measure of derivative bargaining power analogous to that generated by the creation of participation rights under a judicial system of interest representation without a number of the major costs: lengthy formal proceedings; exorbitant litigation expenses; and a disquieting reliance on judicial superintendency.

Nonetheless, the objection remains that a direct system of interest representation would constitute a serious breach of the principle of formal separation of governmental authority and private autonomy.<sup>583</sup> This separation of power is arguably necessary in order to preserve an identifiable sphere of private association, and to facilitate the assertion of an effective governmental counterweight to abusive exercises of private power. The close and extensive cooperation between organized interests and official agencies that is characteristic of our society today undermines these arguments' persuasiveness. Nonetheless, the formal separation of governmental authority and private association is a fundamental tenet of our political theory, and is not likely to be abandoned in the near future.<sup>584</sup>

### *C. The Limits of Political Interest Representation*

The political nature of an agency made up of representatives of competing interests and the openly partisan stance that board members may therefore assume suggest that plenary responsibility for the full range of administrative activities should not

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<sup>582</sup> Professor Davis finds that a tripartite principle of interest representation (management, labor, and "public") proved successful in the administration of the Wage and Hour Division established by the Fair Labor Standards Act. While these representative bodies were designated as advisory, the agency in practice accepted the overwhelming majority of their recommendations. 1 K. DAVIS, *supra* note 2, at 367-70 (1958).

<sup>583</sup> See A. LEISERSON, *supra* note 222, at 11-12; H. LASKI, *AUTHORITY IN THE MODERN STATE* 89-109 (1919).

<sup>584</sup> See A. LEISERSON, *supra* note 222, at 283-284.

The ultimate paradox of interest representation is that, although interest or class analysis is the most revealing method of explaining social phenomena, explicit representation of organized groups always struggles against a tremendous burden of proof.

Compare Fuchs, *Governmental Decision-Making in the Great Society*, 1968 WASH. U.L.Q. 361, 374-75 (1968).

be vested in such an agency. In adjudicatory proceedings involving disputes among various economic and social interests, it is doubtful whether an agency made up of representatives of such interests would act, or would be perceived as acting, with sufficient impartiality to assure fair and workable decisions that would be accepted as legitimate.<sup>585</sup> Implicit in a system of direct interest representation is also a substantial potential for conflict among the representatives of competing interests and the possibility of deadlock in the policy formation and dispute resolution processes. Accordingly, it might be unwise to entrust the day-to-day management of the agency's bureaucracy to such a board, lest the factional divisions of the interest representatives come to be reflected in the agency's administration, with a concomitant carry-over of conflict and deadlock.

Finally, a system in which administrators are tied to the various interests they represent makes no provision for independent governmental initiative. Despite its limitations, the current structure of administration provides opportunities for officials to move governmental policy into new grooves,<sup>586</sup> and to preserve important collective values<sup>587</sup> that might be slighted or subverted in a regime of private interest representation where governmental policy approaches a vector of private forces.

The problems with the interest representation system could perhaps be avoided, or at least ameliorated, by provision for an independent agency head, appointed by the President, who would exercise responsibility over agency functions — including internal management and adjudication<sup>588</sup> — that should not be left to partisan interest representatives, and who might also provide a measure of independent initiative in response to changing conditions.<sup>589</sup> Interest representatives would be constituted in a

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<sup>585</sup> Judges have questioned the impartiality of tribunals composed of interest group representatives, *see, e.g.*, *Johnson v. Michigan Milk Marketing Bd.*, 295 Mich. 644, 295 N.W. 346 (1940) (milk marketing board drawn from members of interest groups with financial stake in price orders violates due process), although they have not outlawed all such tribunals. *See* 1 K. DAVIS, *supra* note 2, at 138-47; 2 *id.* at 157-59.

<sup>586</sup> *See, e.g.*, G. SHUBERT, *supra* note 74, at 111; Vaughn, *State Air Pollution Control Boards: The Interest Group Model and the Lawyer's Role*, 24 OKLA. L. REV. 25 (1971) (state air pollution control authorities constituted of interest representatives have seriously hampered the creation of effective pollution control programs).

<sup>587</sup> *See* R. WOLFF, *supra* note 81, at 159; B. BARRY, *supra* note 140, at 207-38.

<sup>588</sup> Alternatively, adjudicatory responsibilities might be vested in a tribunal independent of both the council and the agency head. *See, e.g.*, Elman, *A Modest Proposal for Radical Reform*, 56 A.B.A.J. 1045, 1047-48 (1970).

<sup>589</sup> The efforts of the Deputy NRA Code Administrators in pushing compromise of labor and business interests was an important factor in the prompt adoption of the NRA codes. *See* L. LYON, ET. AL., *supra* note 581, at 131-37. Similar leadership

"council" that would promulgate general guidelines for agency action in the form of rules and regulations that would, presumably, be the product of bargaining among all of the affected interests. The members of this council would have a strong incentive to maximize the proportion of agency policy choices accomplished through rules and regulations which they would promulgate. Increased agency use of regulations would in turn provide a check on ad hoc adjudication in the administrative process and would tend to secure formal justice.<sup>590</sup> On the other hand, the division of authority between such a council and an independent agency head could seriously undermine the agency's capacity for effective action, and might also diminish the attractions of the scheme for interest groups.

#### *D. The Judicial Role*

The development of a political system of interest representation would not eliminate the judicial role in the administrative process. The courts would continue to exercise their traditional functions of restraining agency discretion within the bounds of legislative directives, and of assuring that appropriate procedural safeguards were provided, at least in adjudicatory proceedings. However, the developing judicial role in controlling agency discretion by expanding participation rights at the agency level and insisting upon adequate consideration of all affected interests would, in theory, be severely circumscribed. Since agency policy would result from a bargaining process in which all affected interests (as determined by the legislature) are directly or indirectly represented, there should be no occasion for judicial inquiry into the nature of the interests that participate in the decisionmaking process or into the consideration (adequate or otherwise) accorded to each of the competing interests, so long as the council remained within the usually broad confines of applicable statutes.<sup>591</sup>

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apparently played an important role in the reported success of employer-employee-public representative advisory committees in the Wage and Hour Division of the Fair Labor Standards Administration. See 1 K. DAVIS, *supra* note 2, at 367-401. See also A. LEISERSON, *supra* note 222, at 266. The superintendency of a single, appointed head might also buttress the constitutionality of the delegation of legislative power to representatives of private organizations. See *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126 (1941); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940); *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939); *Curran v. Wallace*, 306 U.S. 1 (1939). See generally Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937).

<sup>590</sup> See, e.g., H. FRIENDLY, *supra* note 28, at 1-26.

<sup>591</sup> Judicial review may be seen as a substitute for direct political controls on agency policy. Compare *Citizens Ass'n of Georgetown, Inc. v. Zoning Commission*, 477 F.2d 402, 409 n.28 (D.C. Cir. 1973) (suggesting a significant role for the

The judges might be reluctant, however, to abandon their expanding superintendency of the agencies' discretionary policy choices. Instead, transformation of the process of agency decision into an explicitly political form might well heighten judicial sensitivity to the problem of discretion in agency policy choice. Once interest representation becomes the avowed basis for agency decision, perceived inequities or inadequacies in that system may generate additional pressures for judicial control, particularly if certain private interests are viewed as having seized the apparatus of government to direct it against others.<sup>592</sup> To the extent that agency policy is formulated through rules and regulations adopted by a representative council, however, procedural grounds for reversing agency decisions may be rare. Accordingly, the only acceptable way in which the judges might protect interests that were unduly disadvantaged in a political system of interest representation would be through use of the *Overton Park* technique to construe narrowly the applicable statutory directives in order to limit agency discretion.

*E. Political Systems of Interest Representation:  
Interim Conclusions*

The foregoing discussion is unlikely to kindle enthusiasm for a political system of interest representation as a means of fostering greater administrative responsiveness to the entire range of interests affected by agency action. The direct election of agency members or their selection by designated interest groups would constitute a radical departure from established principles and practices, which dictate that governmental powers should ordinarily be exercised by public officials who are not formally ac-

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courts in reviewing decisions of executive agencies that are not directly responsible to the electorate), *with* *Citizens for Allegan County v. FPC*, 414 F.2d 1125 (D.C. Cir. 1969) (suggesting a narrow scope of judicial review where agency selected policy approved in a referendum of affected persons).

<sup>592</sup> Judicial concern for the position of a minority interest group in an organization dominated by a hostile majority is reflected in diverse contexts. *See, e.g., Stark v. Wickard*, 321 U.S. 288 (1944) (milk producers have standing to complain of diversion, under federal marketing order, of sale proceeds to cooperatives of which they are not members); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (delegation to union and employer groups of power to fix prices and wages unconstitutional: "The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority"); *Roberts v. Fuquay-Varina Tobacco Bd. of Trade, Inc.*, 405 F.2d 283 (4th Cir. 1968) (Tobacco Board rule favoring established Board members questioned). *See also* *Michigan Milk Mktg. Bd. v. Johnson*, 295 Mich. 644, 295 N.W. 346 (1940) (price fixing by milk marketing board made up of state Commissioner of Agriculture, two milk producers, one milk distributor, and one consumer held to violate due process guarantee that pricing be based on a fair and impartial hearing because a majority of the board had a financial stake in the matters before it).

countable to any identifiable private organization or group. The potential dangers in an interest representation system are obvious: heightened conflict over policy choices leading to domination or deadlock; the fragmenting of governmental authority and responsibility; the impairment of administrative efficiency and impartiality; the erosion of government's ability to lead and innovate. If, in an effort to meet some of these dangers, power is shared between interest-group representatives and other agency organs, the virtues of a system of representation may be undermined. Moreover, there is no assurance that the processes of election or selection will produce a weighting of affected interests in the membership of a representative council — much less in the policies of the agency — that is appropriate and just by whatever criterion one may apply.

A system of representation probably could only be applied to a limited number of agencies — most notably the independent regulatory commissions that exercise broad legislative-type responsibility over a field of policy. As operational responsibilities and the need for decisive management increase — as with the Food and Drug Administration, the Environmental Protection Agency, or the Highway Administration — the drawbacks in a political system of interest representation become more apparent. And plainly there are many important areas of government, such as the Justice Department, where a system of interest representation would be intolerable, despite the degree of discretion involved.

In view of the potential hazards in a political interest-representation system, and the inertia in accepted principles of political organization, it seems improbable that such a novel system of administrative organization would ever be adopted. Even in the case of advisory committees, which would seem to provide fertile ground for experimentation, there appears scant prospect for any serious attempt to develop explicitly representative mechanisms.<sup>593</sup>

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<sup>593</sup> Normally, administrators have either enjoyed complete discretion in selecting the membership of advisory committees, or the governing statute has defined affiliational or occupational qualifications in terms so broad as to limit administrators' effective discretion only slightly. The make-up of these advisory committees has been criticized as unduly favoring organized interests, particularly industrial firms. See, e.g., Brown, *The Management of Advisory Committees: An Assignment for the 70's*, 32 PUB. ADM. REV. 334, 339 (1972); Steiner, *Advisory Councils and National Social Welfare Policy*, in T. CRONIN & S. GREENBURG, *THE PRESIDENTIAL ADVISORY SYSTEM* 250 (1969). Even where an administrator seeks a broader representation of interests, he may naturally be prone to seek representatives amenable to his leadership and policies. *Presidential Advisory Committees, Hearings of the Special Studies Subcommittee of the House Committee on Government Operations*, 91st Cong., 2d Sess. 184 (1970) (testimony of Thomas Cronin, Brookings Institute). Moreover, the process of selection and participation is

The effort to utilize representative principles to control and legitimate agency discretion seems ultimately to lead to a dead end. The question thus becomes whether any other path can be found that leads out of the labyrinth.

## VI. EVALUATION AND PROSPECT

### *A. Inadequacies of the Interest Representation Model as a General Solution to the Problem of Agency Discretion*

A system of interest representation, whether judicial or political, is not an acceptable general solution to the problem of delegated legislative power exercised by administrative agencies. Resource costs and other burdens would be intolerable if a judge-made system of interest representation were universally applied. When agency and judicial proceedings require well over a decade to approve or disapprove a single power facility,<sup>594</sup> unrestrained use of judicial procedures for resolving disputed economic and social issues can threaten chaos. Moreover, such a solution would involve a troubling aggrandisement of judicial power by giving the courts control over access to the decision-

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typically informal and not calculated to generate involvement by potentially interested "outsiders."

Accordingly, Congress might well consider requiring the creation of advisory committees whose membership would be selected by designated organizations. Although one of the predecessor bills to the 1972 Federal Advisory Committee Act — S. 1637, 92d Cong., 1st Sess. (1971) — would have required that one-third of each advisory committee's members be "public," non-industry representatives, this provision was not incorporated in the bill that became law. See Note, *The Federal Advisory Committee Act*, 10 HARV. J. LEGIS. 216, 222-25 (1973).

Congress has at times required the use of advisory committees with comparatively specific membership qualifications to temper the exercise of administrative discretion. See Borchardt, *supra* note 574; Legal Services Corporation Act of 1974, 88 Stat. 378, § 1004(E), 42 U.S.C.A. § 2996c(f) (West Supp. 1975) (majority of state advisory committees must consist of attorneys admitted to practice in state). See also sources cited at note 589 *supra*. Additionally, federal grant programs have required participation by groups representative of affected interests in local administration of programs. See, e.g., Chacon v. Hodgson, 465 F.2d 307 (7th Cir. 1972) (Concentrated Employment Program requirement of participation by local residents in planning and evaluation); North City Area-Wide Council, Inc. v. Romney, 428 F.2d 754 (3d Cir. 1970), 456 F.2d 811 (1972), 469 F.2d 1326 (1972), cert. denied, 406 U.S. 963 (1972) (Demonstration Cities Act requirement of "widespread citizen participation" and "local initiative in . . . planning").

There is also considerable experience at the state level with provisions for designated interest group representation on governmental boards and agencies. See generally Vaughn, *supra* note 586. As the capacity of legislatures to serve as ultimate arbiters of conflicting social and economic interests shrinks with the expansion of governmental responsibilities, see p. 1806 *infra*, such bodies present alternative models of governance that deserve investigation.

<sup>594</sup> See note 540 *supra*.

making process and an ultimate power of revision over policy choices.

Equally disturbing is the potential atrophy of political consciousness and responsibility were judges and lawyers to assume custody over issues properly resolved by political means. Professor Jaffe, a proponent of expanded public interest representation, concedes that in most cases "the work done by public [interest] actions could . . . be *better* performed . . . by political and administrative controls."<sup>595</sup> In the default of other branches, judicial intervention is understandable, but the malaise and alienation generated by a large, centralized, seemingly remote and impersonal government are likely to be exacerbated by such a course.<sup>596</sup>

A judicially developed system of interest representation may also be comparatively ineffective in achieving its proclaimed goals. Full implementation of the formal participation and standing rights that are central to the interest representation model of administrative law would enormously increase the expense of the administrative process and might, in practice, increase the barriers to participation by interests that are not well-organized or affluent. Such barriers are even more likely now that the Supreme Court has announced, in its *Alyeska Pipeline*<sup>597</sup> decision, that the costs of interest representation cannot be judicially shifted to affluent litigants; thus the apocalyptic vision of "a thousand Naders . . . with hundreds of thousands of dollars"<sup>598</sup> will not come to pass. Finally, discretionary judicial and administrative controls are required to limit actual participants in any proceeding to a workable number, but such controls also restrict the opportunity for participation by groups that should theoretically be represented.

Even if a judicially-enforced system of interest representation were implemented, the elaborate machinery of interest group participation may not significantly alter agency policy in favor of hitherto unrepresented interests without an unprecedented and unlikely measure of repeated judicial intervention in the process

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<sup>595</sup> L. JAFFE, *supra* note 2, at 476.

<sup>596</sup> It is a counsel of despair to urge that litigation "is in many circumstances the only tool for genuine citizen participation in the operative process of government." J. SAX, *supra* note 432, at 57. As Thayer long ago observed, judicial intrusion is "always attended with a serious evil, namely, that the correction of [government] mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way and may tend to dwarf the political capacity of the people, and to deaden its sense of moral responsibility." J. THAYER, JOHN MARSHALL 106-07 (1901).

<sup>597</sup> *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 43 U.S.L.W. 4561 (U.S. May 12, 1975).

<sup>598</sup> Johnson, *supra* note 216, at 900.

of agency decisionmaking.<sup>599</sup> Indeed, the courts' traditional sanction of nullity is hardly an apt tool for securing more aggressive and effective action by regulatory agencies. Moreover, a formalized judicial scheme of interest representation may be largely powerless to redress asserted biases in agency policies attributable to features other than imbalance in formal representation, including such factors as the continuous input from regulated or client firms, the political staying power of well organized interests, and the substantial dependence of government administrators on the private interests for whose conduct they bear responsibility.<sup>600</sup> The amelioration of agency bias wrought by the judicial system may thus be largely cosmetic.

The drawbacks in an overtly political system of interest representation are even more glaring. Popular election of agency members may do little more than illustrate the futility of populist pieties and provide fresh occasion for "capture." Devolution of governmental authority to private interest representatives runs the risk of either deadlock or domination, and may seriously undermine the possibility of collective endeavors to shake the status quo.

The inescapable conclusion is that, in most instances, the drawbacks of a full-fledged system of interest representation — whether judicial or political — outweigh the foreseeable gains. In many fields of administration, the widespread effects of governmental decisions or the need for swift, decisive action may render formal schemes of representation for all affected interests intolerably burdensome. Even where these imperatives are absent, the case for interest representation may be doubtful if we are to give weight to policy outcomes as well as to processes of decision. A measure of deregulation seems eminently desirable in many sectors,<sup>601</sup> yet interest groups that have become formally enmeshed

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<sup>599</sup> Courts may be extremely reluctant to assume such a large role in light of the technical complexity of many of the substantive issues involved in administrative proceedings. See, e.g., *Union of Concerned Scientists v. AEC*, 499 F.2d 1069, 1094 (D.C. Cir. 1974) (McGowan, J.) (remarking on the "extraordinary tasks" involved in judicial review of such issues and suggesting that "many of these more esoteric battles must largely be won or lost at the agency level").

Judge Bazelon has suggested that these difficulties can be avoided by judicial imposition of procedural requirements on agencies designed to ensure decisions responsive to all relevant considerations. See *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 650-52 (D.C. Cir. 1973) (Bazelon, J., concurring). But the analysis in this Article suggests that the ideal of a purely procedural solution to the problem of agency discretion is largely chimerical. Compare Leventhal, *Environmental Decisionmaking and the Role of The Courts*, 122 U. PA. L. REV. 509 (1974), with Wright, *supra* note 73.

<sup>600</sup> See pp. 1685-86 *supra*; S. LAZARUS, *supra* note 476, at 68, 89-91; Boyer, *supra* note 79, at 141.

<sup>601</sup> See pp. 1689-93 *supra*.



in agency administration are unlikely to call for the agency's abolition. In other areas, it would be desirable for agencies to adopt policies designed to maximize allocational efficiency, but such policies are unlikely to emerge from a formalized process of bargaining among affected interests that will generate pressures for compromise and an "equitable" division of burdens and benefits.<sup>602</sup>

Such criticisms of the interest representation model do not necessarily imply that the principle of representation of affected interests has no place in the continuing effort to control and legitimate administrative decisions. Representational mechanisms may well play a useful and significant role in the future evolution of administrative law, but they do not represent a comprehensive solution to the problem of agency discretion for the foreseeable future.

### *B. The Present Condition and Future Task of Administrative Law*

The analysis of this Article demonstrates that the delegation of broad authority to agencies has gravely undermined the ability of the traditional model to control government power, but that no general solution — either in terms of procedural mechanisms or authoritative rules of decision — for the resulting problem of administrative discretion has yet emerged. The disintegration of the traditional model may be symptomatic of a more general and irremediable loss of faith in the possibility of authoritative, generally-applicable rules or procedures for governing collective choice. Accepting this view, we must dismiss as futile efforts to resurrect any unified model of administrative law, and instead devote our energies to treating various instances of administrative "failure" through case-by-case examination. This we might term the Nominalist Thesis. On the other hand, interest representation might be the generative principle in the emergence of a new, embracing model of administrative law whose apparent limitations and dilemmas will be resolved as the model matures. This we might term the Transitional Thesis.

1. *The Nominalist Thesis.* — The disintegration of the traditional model may be traced to the inconsistency between broad administrative discretion and our received tripartite theory of government, an inconsistency which was recognized decades ago<sup>603</sup> but has never been resolved. Each of the three historic

<sup>602</sup> See S. WHITNEY, *supra* note 581, at 166-68; Stigler, *The Economics of Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

<sup>603</sup> See pp. 1677-79 *supra*; FTC v. Ruberoid Co., 343 U.S. 470, 487-88 (administrative agencies a fourth branch of government that has "deranged our three-branch legal theories").

branches of government bears its authoritative principle: representative compromise, executory management, reasoned adjudication. But no one of these can successfully accommodate the administrative process.<sup>604</sup> It has long been recognized that agencies with broad regulatory and managerial responsibilities cannot realistically be viewed as courts under another name. Moreover, we have been disabused of the notion that administrators are simply the executory amanuenses of the legislative will. Finally, while agencies are now understood to exercise a broad power of choice among competing interests and values, they do not bear the imprimatur of elected representation enjoyed by the legislature.

There are two possible responses to the realization that legislative discretion is exercised by agencies, both of which this Article has examined and found wanting. One might somehow attempt to require the legislature to take back the discretion it has delegated; but such a program overlooks the inability of any single elected body to resolve more than a small proportion of the major issues of collective choice in a developed society. On the other hand, agencies could be invested with the legitimating rituals of election. However, the formal one-person, one-vote principle which sustains the legislature is too brittle to permit its wholesale application to numerous agencies enjoying substantial measures of discretionary power — hence the effort to develop other modes of representation in administrative decision by resort to individuals or organizations that purport to speak for broad classes of private interests. But this stratagem simply pushes back the problem of representation to a prior stage; because the interests of broad categories of individuals, such as “consumers,” are not self-defining, we cannot say that a given litigant or organization truly speaks for “consumers” unless there is some mechanism that ensures this. Moreover, the decision as to which interests will be admitted to the process of decision and in what proportions is also a discretionary one, and so we have not escaped the problem of choice.

The inability of the legislative model to provide a means of controlling agency discretion<sup>605</sup> accounts in large part for re-

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<sup>604</sup> See J. LANDIS, *supra* note 31 at 10-12.

<sup>605</sup> Throughout most periods of history, and again today, government has been predominantly “executive.” L. JAFFE & N. NATHANSON, *supra* note 106, at 13-14. The principle that an elected legislature is the sole legitimate forum for resolving conflicting social and economic interests is a comparatively recent development whose rapid obsolescence is evident in the developments examined by this Article. Cf. B. BOSANQUET, *THE PHILOSOPHICAL THEORY OF THE STATE* 245 (3d ed. 1920) (“Every institution . . . works as a theory, and either masters its facts or fails to master them . . .”).

newed interest in the reductionist theories of economists<sup>606</sup> and philosophers<sup>607</sup> that seek to dissolve collective choice into individual exchange and public law into private law, thus limiting the administrative function. However, as previously noted,<sup>608</sup> those theories are unlikely to provide a solution to some of our most pressing immediate difficulties. The administrative state will abide, successfully resisting efforts to abolish it or reduce its operation entirely to market analogues. The only conceivable way out of the labyrinth would seem to be a new and comprehensive theory of government and law that would successfully reconcile our traditional ideals of formal justice, individual autonomy, and responsible mechanisms for collective choice, with the contemporary realities of decentralized, uncoordinated, discretionary exercises of governmental authority and substantial disparities in the cohesiveness and political power of private interests. Such a conception may well be unattainable, and in any event will not be achieved in the foreseeable future.

This is not necessarily grounds for despair. It may be persuasively argued that the ideal of a unitary theory of administrative law is untenable and is likely to distract us from the world's complexity and hinder the development of realistic solutions to the variety of problems that confront us.<sup>609</sup> If this argument were accepted, the interest representation principle could be viewed, not as a general model for dealing with agency discretion, but as a technique for dealing with specific problems of administrative justice. Selective use of such a technique could be warranted in cases where the desirability of fully and formally assessing the effect of alternative policies on various affected interests clearly outweighs the burdensome delays and other costs involved, especially if there is reason to believe that the agency

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<sup>606</sup> See, e.g., M. OLSON, *supra* note 81; J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* (1962).

<sup>607</sup> See, e.g., R. NOZICK, *supra* note 104.

<sup>608</sup> See pp. 1689-93 *supra*.

<sup>609</sup> See note 5 *supra*. See also REPORT OF THE ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, S. Doc. No. 8, 77th Cong., 1st Sess. 20 (1941); Gardner & Greenberger, *Judicial Review of Administrative Action and Responsible Government*, 63 GEO. L.J. 7, 27-30 (1974).

The search for a general theory of administrative law may, as this Article perhaps suggests, be the pathology of the academic. As Professor Jaffe has remarked,

One of the risks of writing in "administrative law" is the temptation to press general attitudes too far to make them, as it were, do too much work.

We all yield to this . . . . We all know that there is a great variety of administrative powers . . . .

Jaffe, *supra* note 5, at 410-11. But the desire to order, both intellectually and institutionally, the diverse terrain of governmental administration is shared by the legal profession generally.

will take an unduly narrow view. In other situations control techniques such as deregulation, application of the clear statement principle, requirements of adherence to previously established substantive rules of decision, and application of the allocational efficiency criterion may appropriately be applied.

From this perspective, occasional judicial resort to the machinery of expanded participation rights in order to focus attention on "underrepresented" interests could be acceptable as a limited part of a more general effort to redress deficiencies in contemporary agency performance. Given judicial selectivity and the likelihood that funding will never be provided in sufficient abundance to afford representation to every relevant affected interest, the resource costs of such a limited system of interest representation may not appear excessive.

In addition, the aggrandizement of judicial power resulting from court enforcement of the interest representation model may not be large or seriously troubling. While court enforcement of an interest representation model may increase the opportunities for ad hoc judicial revision of agency policy choices, it is unlikely that such opportunities will be exploited very frequently.<sup>610</sup> Moreover, until the improbable arrival of the day of radical transformation in the nature of bureaucracy, one must probably rely upon outside, general-purpose institutions to check agencies' tunnel vision and ensure that important affected interests are not totally ignored. The extension of bureaucratic authority has outstripped the capacity of the traditional general-purpose political organs — the Congress and the President — to discharge such a responsibility adequately. In many cases, the courts must exercise a check or it will not be exercised at all.<sup>611</sup> In the end, the array of doctrinal techniques utilized by courts to expand participation rights may prove acceptable, not because we really believe in the interest representation principle, but because they represent useful judicial levers for the redress of clear failures in the operation of specific agencies.<sup>612</sup> But if we are thus willing to countenance selective judicial intervention in discretionary

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<sup>610</sup> See p. 1784 *supra*; S. LAZARUS, *supra* note 451, at 248-49.

<sup>611</sup> Moreover, as discussed above, see pp. 1740-42 *supra*, the courts' exercise of such a check in the context of non-constitutional adjudication does not necessarily leave the judges as ultimate arbiters of government policy. Political revision of judicial action may come either by legislation, see, e.g., *Wilderness Soc'y v. Morton*, 495 F.2d 1026 (D.C. Cir. 1974), *rev'd sub nom. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 43 U.S.L.W. 4561 (U.S. May 12, 1975), or by more informal political mandates to the agencies which the courts are likely to respect. Compare *Citizens Communications Center v. FCC*, 463 F.2d 822 (D.C. Cir. 1972), with *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971). See generally Sax, *supra* note 432.

<sup>612</sup> See Shapiro, *supra* note 355, at 723.

agency policy choices, it would be preferable for the judges explicitly to set aside policy choices as unsound rather than resorting to indirect and costly procedural stratagems.

Reliance on judges and public interest litigants to rectify the perceived failings of our administrative system may be indispensable if unorganized interests are to enjoy an acceptable measure of recognition.<sup>613</sup> Despite the reluctance of many other nations to give a larger role to the courts in supervising the policy choices of governmental agencies, we are still inclined to distrust the fairness and rationality of political and bureaucratic processes, believing that "one of the chief advantages of having issues of social controversy passed upon by the courts [is the] opportunity for a thorough presentation and testing of the issues before an [independent] tribunal under safeguards which make for impartiality."<sup>614</sup> The development of a judicial system of interest representation as a response to the increased significance of administrative discretion in the life and activity of the country is consonant with our traditions and is perhaps an inevitable response to new conditions<sup>615</sup> in the face of apparent legislative and executive inertia or incapacity.

If this analysis is accepted, a central problem becomes how to determine the occasions on which selective judicial effort to promote consideration of a greater variety of affected interests should be applied, and how such efforts should be meshed with other techniques for controlling agency discretion.<sup>616</sup> Like the notion of interest representation, no one of these alternative techniques offers a total solution, yet each can make a significant contribution. However, merely to acknowledge the limited validity of these various control techniques provides little guidance as to the circumstances in which each should be applied.<sup>617</sup> Conceding the

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<sup>613</sup> See Jaffe, *supra* note 361, at 1038.

<sup>614</sup> J. DICKINSON, *supra* note 124, at 232.

<sup>615</sup> While it has been asserted that "[l]egal domination of the regulated industries field" and the "adoption of trial techniques in agency proceedings" were largely matters of historical accident, see Boyer, *supra* note 79, at 133 & n.80, such a thesis ignores our deep concern to limit government power in order to protect private interests, and our traditional reliance on the judiciary to enforce such limitations. See J. DICKINSON, *supra* note 124, at 212-19, 230-35; M. VILE, *supra* note 36, at 335.

<sup>616</sup> See pp. 1689-1711 *supra*.

<sup>617</sup> This task is complicated by the circumstance that the various means of dealing with the problems created by broad legislative delegations may be viewed as so many brands of ideology. Deregulation or allocational efficiency may often benefit those presently dominant private interests who stand to gain from a market regime. Representation of all affected interests is the aim of those largely excluded from power and influence. Formal justice is often the battle cry of those who seek to thwart the administrative process. In these circumstances, the institutional reformer must combine a clearheaded view of the interaction between

lack of any single "solution" for administrative discretion, one might seek to order these diverse control techniques through a differential analysis.

Administrative agencies might be classified by their function, structure, powers, environment, and the nature and quantities of discretion exercised.<sup>618</sup> The tasks and policy issues involved in welfare administration might be found to be completely different from those presented in the regulation of the airline industry. The need for judicial supervision might vary between agencies (such as the Federal Energy Office) so hastily and recently created that they can scarcely be recognized as independent bureaucratic units, and long established agencies (such as the ICC) whose operations have for decades moved in well-worn grooves of their own making. Some agencies that nominally enjoy enormous statutory discretion (such as the FCC) will be found in practice to be closely confined by political pressures, while other agencies with narrower statutory mandates (such as the Internal Revenue Service) may enjoy a greater measure of operational independence. These and other vital differences — which are likely to be obscured by any single conception of administrative law — invite comparative classification.

Such a classification of agency functions and institutional contexts might be paralleled by a similar classification of the various techniques for directing and controlling administrative power, including judicial review, procedural requirements, political controls, and partial abolition of agency functions. The two systems of classification might then be meshed to determine the most harmonious fit between the purposes and characteristics of particular agencies and various control techniques.<sup>619</sup> Any design quite so grandiose is of course unlikely to be achieved in full, but it marks out a potentially rewarding line of inquiry that may represent our best hope of realistic future progress in administrative law.

2. *The Transitional Thesis.* — The alternative diagnosis of the present state of administrative law would view its disjointed and fragmented condition as a passing, interim phase. Such a view may be justified because history suggests that the conceptual vacuum created by the disintegration of the traditional model will not remain long unfilled. We may be unable to see beyond the

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social policies and institutional mechanisms with an instinct for shrewd compromise among contending social forces. See generally Jaffe, *supra* note 77.

<sup>618</sup> Ernst Freund's *ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY* (1928) is such an undertaking. However, his system of classification, directed at the governmental functions of that day, is inadequate for the much expanded range of governmental powers that we confront.

<sup>619</sup> See *id.*

shards of the immediate present and are thus forced to talk of "pragmatic compromise" in order to conceal our embarrassment; but the law cannot be reduced entirely to a process of interstitial adjustment or social engineering. A new conception of administrative law and its relation to political theory may be forming among the ruins of the old. Historically, the underlying premise of administrative law has been the limitation of governmental power in order to preserve private autonomy.<sup>620</sup> In an era of comparatively circumscribed administrative powers, the restriction of official discretion by reference to the common law and statute was a workable and satisfying concept. Given the enormous expansion of governmental activity, not only in the regulation of private activity but also in the provision of goods, services, and advantageous opportunities, it is no longer an adequate or even coherent model. The distinct spheres of private and governmental activity have melded. These developments have necessitated the delegation to agencies of considerable discretion to determine government policy and to distribute the resulting benefits and burdens. They have also emasculated principles of restraint based on exogenous limits, which may, in any event, be of little assistance when what is desired is an affirmative, but more equitable, exercise of government powers.

In the absence of any broad agreement on appropriate social goals, the development of an interest representation model of administrative law appears as a logical and inevitable response to these changed conditions. In seeking to resolve problems of collective choice while adhering to the deeply rooted principle that an individual should be represented in some fashion in decisions that seriously affect his welfare, the interest representation model addresses issues that reach beyond administrative law. Concern over the accretion of government power and dissatisfaction with the responsiveness of institutions to interests they affect is not limited to governmental agencies. Large corporations, and to a lesser degree, universities, unions, and foundations are the subjects of analogous discontent.<sup>621</sup> While the size and influence of these institutions has burgeoned, traditional methods of controlling them have increasingly been found wanting.

For example, in the "modern" corporation,<sup>622</sup> two controlling factors have been thought to assure the utilization of corporate resources in socially desirable ways: competition and the maxi-

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<sup>620</sup> See Jaffe & Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L.Q. REV. 345 (1956); L. JAFFE, *supra* note 2, at 204-12, 329-34.

<sup>621</sup> See, e.g., T. COOK & P. MORGAN, *PARTICIPATORY DEMOCRACY* (1971).

<sup>622</sup> See generally Vagts, *Reforming the 'Modern' Corporation: Perspectives from the German*, 80 HARV. L. REV. 23 (1966).

mization of shareholder return. Where these controls failed to prevent socially unacceptable results, a third form of control was introduced, government regulation. Today, however, these three forms of control are perceived as inadequate to prevent the accretion of substantial discretionary powers to corporate managers. The force of competition has assertedly been eroded by market concentration and the growth in the absolute size of business firms.<sup>623</sup> In the typical public-issue corporation, shareholders no longer exercise any direct control over management decisions.<sup>624</sup> Official regulatory agencies are charged with ineffectiveness on a number of grounds.<sup>625</sup> Although disputed, the conclusion that traditional controls are ineffective has stimulated proposals to control corporate discretionary power through the representation of affected interests<sup>626</sup> in corporate decisionmaking processes. For example, proposals have been advanced for the selection of directors by consumers and employees.<sup>627</sup> Moreover, there is some sign of developing judicial support for extending participation rights in corporate decisions to a wider variety of affected interests.<sup>628</sup>

Thus the conditions of ferment one can discern in administrative law extend across a wider front. The movement for expansion of participation rights is not a judicial idiosyncrasy; it apparently speaks to the condition of the age, reflecting the expansion of governmental functions and a changed conception of the status of the individual in society. The ideal of private autonomy — limited only through governmental constraints authorized by a popularly elected legislature — is impoverished and incomplete in an urban, technological society.<sup>629</sup> We have come to view man's opportuni-

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<sup>623</sup> See, e.g., M. GREEN, *THE CLOSED ENTERPRISE SYSTEM* 1-29 (1972).

<sup>624</sup> See A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (rev. ed. 1968); Chayes, *The Modern Corporation and the Rule of Law*, in *THE CORPORATION IN MODERN SOCIETY* (E. Mason ed. 1959).

<sup>625</sup> Compare M. GREEN, *supra* note 623, with Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47 (1969).

<sup>626</sup> See, e.g., A. Chayes, *supra* note 624; P. BLUMBERG, *CORPORATE RESPONSIBILITY IN A CHANGING SOCIETY* (1972).

<sup>627</sup> See Schwartz, *The Public-Interest Proxy Contest: Reflections on Campaign GM*, 69 MICH. L. REV. 421 (1971); P. BLUMBERG, *supra* note 626, at 64-66.

<sup>628</sup> See *Medical Comm. for Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972). These developments represent an ironic reversal of James Landis' logic. Pointing to the similarity in powers wielded by corporate executives and administrative officials, he asserted that courts should accord administrators the same latitude of choice and freedom from institutional constraints as that accorded business executives. See J. LANDIS, *supra* note 31, at 10-12. Today, however, we seem to be pursuing the "political" rather than the "industrial" analogue by subjecting corporate decisions to formal procedures for interest representation that are similar to those that have been imposed on administrative agencies.

<sup>629</sup> See R. UNGER, *supra* note 33; R. WOLFF, *supra* note 81.



ties as an attribute of a social milieu powerfully shaped by collective action, both "private" and governmental. Yet our received models of social choice — the elected legislature and the market — seem entirely incapable of effectively controlling the expanded machinery of government or of securing an adequate sphere for individual self-determination. Conceivably, the interest representation model might develop into an acceptable solution to this dilemma.

3. *The Uncertain Prospect.* — Because it is so directly concerned with reconciling government power and private interests, administrative law is peculiarly vulnerable to the intellectual and social pressures resulting from the juxtaposition of frayed ideals and current realities. In response to such pressures, stemming from the expansion of governmental influence over personal welfare and the contemporary perception that agencies enjoy discretion and that they have misused it to favor organized and regulated interests, judges have expanded formal participation rights in a fashion that points toward the development of an interest representation theory of administrative law to replace the traditional model. Whether a fully-articulated model of interest representation will emerge from these efforts, or whether interest representation is simply an interim stage in the emergence of some totally new conception of the relation between administrative institutions, legal controls, private groups, and social and individual values, is as yet unclear. Application of the differential analysis counselled by the Nominalist Thesis to clear away the residue of traditional constructs that have outlived the theoretical understandings that gave them authority may well be an essential first step for either development. On the other hand, it is quite possible that no new encompassing theory of administrative law will emerge. The instinct for satisfying integration may remain a vain shuttlecock between no longer tenable conceptions of administrative legitimacy and the exigent difficulties of the present which have so far eluded a consistent general theory. Given "the undefined foreboding of something unknown,"<sup>630</sup> we can know only that we must spurn superficial analysis and simplistic remedies, girding ourselves to shoulder, for the indefinite future, the intellectual and social burdens of a dense complexity.

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<sup>630</sup> G. HEGEL, *THE PHENOMENOLOGY OF MIND* 75 (J. Baillie rev. 2d ed. 1949).

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